Supreme Court, U.S.
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# 80-421

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ERWIN FOXMAN
AND
EDITH FOXMAN,

Petitioners,

v.

JOHN P. RENISON,

Respondent

PETITION FOR WRIT OF CERTIORARI
FROM UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Submitted By:

Howard M. Koff, Esq.
Arthur L. Stern, III, Esq.
Suite 500
One Exchange Street
Rochester, New York 14614
Tele. No.: (716) 546-6320
Counsel for Petitioner

## STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Are the standards enunciated by the Supreme Court in Bordenkircher v. Hayes, 434 U.S. 357 (1978), governing the permissible scope of plea bargaining by a prosecutor, applicable in determining the constitutionality of Respondent Renison's threat to instigate a fraud investigation if Petitioner Foxman did not agree to Respondent's proposed deficiency?

2. Are Petitioners without a cause of action for damages under the Fifth Amendment, arising out of Respondent's conduct of the audit, in view of the fact that IRS review procedures were available to appellants to determine their correct tax liability?

3. Does the deliberate violation of agency regulations, by Respondent Renison, raise a constitutional question of violation of due process?

4. Was Petitioner Erwin Foxman deprived of liberty or property without due process of law if Respondent Renison intentionally caused the termination of a financing relationship between Petitioner Foxman and the First National Bank of Rochester?

5. Should absolute immunity be granted to Internal Revenue Agents from damage suits alleging violations of constitutional rights?

6. Have the Petitioners alleged valid causes of action, under state tort and state constitutional law, against the Respondents; and if so, should these claims be tried by the District Court?

## LIST OF PARTIES TO THE PROCEEDING

1. Erwin and Edith Foxman, Petitioners
2. John P. Renison, Respondent

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2. Opinion of Hon. John T. Curtin United States District Court Judge for the Western District of New York, dated July 18, 1979, granting Respondents motion for summary judgment, together with Notice of Entry thereof dated July 19, 1979.

3. Opinion of Hon. John T. Curtin, United States District Court Judge for the Western District of New

York, dated August 8, 1978, denying Respondent's motion for summary judgment.

4. Order of Court of Appeals for the Second Circuit, dated July 28, 1980, denying Petition for Rehearing with respect to Decision of the Court dated July 28, 1980.

5. Order of Court of Appeals for the Second Circuit, dated July 28, 1980, denying Petition for Rehearing containing a suggestion that the action be reheard in banc with respect to Decision of the Court dated July 28, 1980.

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9. Affidavit of Lester Lempert, dated March, 1977, as docketed by Clerk of District Court.

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1. Opinion of Honorable John T. Curtin, United States District Court Judge for the Western District of New York, dated August 8, 1978, denying Respondent's motion for summary judgment (included in Appendix hereto).

2. Opinion of Honorable John T. Curtin, United States District Court Judge for the Western District of New York, dated July 18, 1979, granting Respondent's motion for summary judgment (included in Appendix hereto).

3. Opinion of Circuit Court of Appeals for the Second Circuit, per Honorable Ellsworth A. VanGraafeiland, Circuit Judge, dated June 16, 1980, affirming judgment of District Court granting Respondent's motion for summary judgment (included in Appendix hereto).

## STATEMENT OF GROUNDS FOR JURISDICTION OF SUPREME COURT OF UNITED STATES

1. The decree sought to be reviewed is the decision of the Circuit Court of Appeals for the Second Circuit, the date of which is June 16, 1980 and the date of entry of which is June 16, 1980.

2. An Order denying Petitioner's petition for rehearing is dated July 28, 1980 (included in Appendix hereto).

3. The statuatory provision which is believed to confer upon this Court jurisdiction to review the decision of the Court of Appeals for the Second Circuit, entered June 16, 1980, is 28 U.S.C. §2101 (c).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment to Constitution of U.S.:

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Policies of the Internal Revenue Service Handbook Internal Revenue Manual 1303 - 89

In all cases, other than corporations, with assets of one million dollars or more, an examining officer will not examine or survey the same taxpayers' returns for con-

secutive years unless the examining officer is considering two or more years returns of a taxpayer simultaneously. Any deviations must be approved in advance by the Chief of Audit Division who will grant approval only when compelling reasons exist.
(superseded after years in issue)

(Current Guideline)

IRM 1218 - Policies of the Internal Revenue Service Handbook Examination Section Policy Statement P-4-5:

Restrictions on an examiner's consecutive survey or examination of returns other than cases in the Coordinated Examination Program

An examiner may not survey or examine a tax return if he/she has surveyed or examined a return of the same taxpayer for any of the three preceding tax periods unless there has been an intervening survey

or examination by a different examiner. If a tax return is under examination in accord with this policy, returns for previous or subsequent tax periods may be examined simultaneously by the same examiner. Any deviation must be approved in advance by the Chief of Examination or Employee Plans and Exempt Organization Division, or District Director in streamlined districts.

## STATEMENT OF CASE

Facts.

The following facts are alleged in the Amended Complaint of Petitioners Erwin and Edith Foxman, filed in December of 1974, and included in the Appendix hereto.

Petitioner Erwin Foxman is a dentist, whose office and residence, since 1967, has been in an area predominantly inhabited by persons of low income and economic means. Accordingly, his practice has been comprised predominantly of medicaid patients.

Respondent John P. Penison, an Internal Revenue Agent, commencing in the year 1971, undertook to audit the income tax returns of the Petitioners for the years 1968-1970. (Par. 19)[1]. He completed this audit in June, 1972 (Par. 20). In

1 Paragraph references are to the Amended Complaint included in the Appendix, unless otherwise indicated.

September of 1972, he undertook to audit the income tax return of Petitioners for the year 1971 (Par. 21). Petitioners allege that Respondent Renison was not assigned the returns of Petitioners through random selection, but upon his own initiative (Par. 22); and that he was motivated to initiate and pursue his investigation because of a bias against dentists, in particular practitioners who rendered large bills to the medicaid authorities (Pars. 23, 24).

Petitioners allege that Respondent Renison, in conducting his audits, intentionally failed to reasonably investigate and consider records and other sources of information provided by the Petitioners in support of claimed deductions (Pars. 28, 31). In particular, it is alleged that Respondent Renison disallowed almost all depreciation claimed on Petitioner Erwin

Foxman's office and business equipment; and in so doing, refused to accept or consider a qualified appraisal offered by Petitioners to support the allocation of the overall purchase price of the building (and equipment purchased therewith) between the residential and business portions thereof. (Par. 35). Further, it is alleged that Respondent Renison refused to accept the fact that receivables of Petitioner Erwin Foxman were factored at a discount to a company named Main Billing Service, and that Petitioner Erwin Foxman therefore received substantially less in income than the face amount of said receivables; such refusal notwithstanding the fact that Respondent Renison examined books of Main Billing Service indicating such discounts. In this regard, it is alleged also that Respondent Renison refused to examine Petitioner Foxman's individual patient card

records, proffered by Petitioner Foxman, and which indicated the discounts. (Par. 36).

Further, it is alleged that Respondent Renison refused to allow losses incurred by Petitioner Erwin Foxman as a one-half owner of a partnership engaged in the breeding and racing of horses, although Respondent Renison examined the books of the partnership, audited the returns of the partnership and Petitioner Foxman's partner, and did not recommend disallowance of the identical losses claimed by Petitioner Foxman's partner. (Par. 37). Further, it is alleged that Respondent Renison disallowed various capital losses, telling Petitioner Foxman to throw away various brokerage-house records which Petitioner Foxman proffered to substantiate the losses. (Par. 38). Further, it is alleged that Respondent Renison refused to accept proof,

in the form of receipted bills, proffered by Petitioner Foxman, for a variety of business expenses; and correspondingly, denied Petitioners' claimed deductions for such expenses. (Pars. 39, 40, 42).

With respect to the audit conducted by Respondent Renison for the years 1968-1970, which he completed in June, 1972, it is alleged that when Respondent Renison presented his proposed disallowances to Petitioner Erwin Foxman, Petitioner Foxman indicated that he did not agree with the proposed findings. Respondent Renison at that point stated that if Petitioner Foxman did not sign the report, agreeing to the deficiency, Respondent Renison would turn the file over to the intelligence division of the Internal Revenue Service for a fraud investigation. (Par. 30; par. 8 of Affidavit of Erwin Foxman, included in Appendix). Accordingly, Petitioners allege

they agreed to the proposed deficiency because of the threat. (Par. 30; par. 8 of Affidavit of Erwin Foxman).

In June, 1972, Respondent Renison commenced an audit of Petitioners' income tax return for 1971. In this audit, it is alleged that Respondent Renison studied records of Petitioner Erwin Foxman, in the office of Petitioner Foxman's accountant, for two days, asking no questions of either Petitioner Foxman or his accountant; and thereupon disallowed various deductions in a report accompanied by a letter signed by Respondent Renison in which he stated: "The records are still too difficult to go by and this is it." (Pars. 31, 32).

It is alleged that Respondent Renison, in conducting the audit of Petitioners for the year 1971, after completing an audit for the years 1968-1970, deliberately violated Internal Revenue Service regula-

tions prohibiting successive audits by the same agent. (Par. 25).

Petitioners allege that as the result of Respondent Renison's further audit of Petitioners' income tax return for 1971, and his findings with respect thereto, Petitioners appealed Respondent Renison's findings, notwithstanding his previous threat of instigating a fraud investigation if such an appeal were taken; and as a result of conferences held between Petitioner Erwin Foxman and Internal Revenue Service personnel in 1973 and 1974, there were substantial reductions in the disallowances of Respondent Renison for the years 1968-1971, including reversals of the specific disallowances described above. (Pars. 33 - 42). However, such conferences and modifications of the proposed deficiencies did not take place until after various collections by way of levies had

been effected upon Petitioners by the Internal Revenue Service. (Par. 34).

The Amended Complaint states that because a large portion of Petitioner Foxman's services were for medicaid patients, it was normally necessary for him to wait several months for payment from the appropriate welfare authorities; and that this financial burden was further exaggerated by the fact that a substantial portion of the work for medicaid patients was of the prosthetic type (bridges and dentures) requiring the disbursement of moneys by Petitioner Foxman. (Pars. 9 - 11). Because of this situation, Petitioner Foxman entered into a financing arrangement with the First National Bank of Rochester, pursuant to which the bank lent to Petitioner Foxman the face amount of his receivables from the medicaid authorities. This arrangement continued from 1969 until ap-

proximately March of 1972, when it was discontinued by the bank. (Par. 13). Petitioners allege that the bank's termination of the arrangement was motivated by the continuing demands for information made by Respondent Renison upon the bank in connection with his audit of the Petitioners' returns; that these demands were far in excess of Respondent Renison's reasonable needs; and that they were intentionally designed by Respondent Renison to harass the bank and thereby cause harm to Petitioner Erwin Foxman. (Par. 45).

As a result of the foregoing actions of Respondent Renison, Petitioners allege that they suffered, and continue to suffer, great nervousness and anxiety; that without limitation, Petitioner Erwin Foxman has been in a state of constant nervous tension, anxiety, and instability, requiring him to take constant medication,

from 1972 to the present time; that this condition has resulted in the substantial diminishment of his capacity to practice dentistry, including a loss of manual coordination, resulting in a very substantial and continuing loss of income; and that this condition has also been disruptive to his marital relationship and has been a constant source of mental pain, suffering and fatigue. The Petitioners also allege that Petitioner Edith Foxman has suffered and continues to suffer from cramps and a high state of nervous tension and that she has therefore been forced to take constant and continuing doses of librium. (Pars. 46 - 54).

Petitioners further allege that the termination by the First National Bank of Rochester of its financing arrangement with Petitioner Foxman, as the result of Respondent Renison's actions, resulted in the

inability of Petitioner Foxman to continue dental prosthetic work for medicaid patients, thereby causing a substantial loss of income on a continuing basis. (Par. 55).

The Amended Complaint specifies and asks for damages of $1,700,000. (Par. 121).

Many of the allegations of the Amended Complaint are supported by affidavits of Petitioner Erwin Foxman, Sidney Galinsky, Lester Lempert and Donna Theim, filed in the District Court, and included in the Appendix hereto. These affidavits attest to the hostility of Respondent Renison, attest as to his various refusals to consider evidence in support of claimed deductions, and attest as to his threat to move the case into a fraud investigation if Petitioners did not consent to his findings with respect to the years 1968-1970.

Legal Bases Alleged:

The Amended Complaint alleges that the actions of Respondent Renison constitute a denial of Petitioners' rights to due process, including equal protection, under the Fifth Amendment to the U.S. Constitution. Specifically, the Amended Complaint alleges that the biased and unobjective investigation of Petitioners' tax returns constituted a perversion of the administrative and governmental processes for imposing tax liabilities upon citizens, thereby violating Petitioners' rights to due process; and further alleges that Respondent Renison's threats of a fraud investigation, in perverting and obstructing the ordinary process of impartial determination and review within the IRS, further violated Petitioners' rights to due process. (Eighth cause of action). With respect to equal protection, the Amended Complaint alleges

that Respondent Renison singled Petitioners out for audit on the basis of criteria unrelated to the effective and proper administration of the Internal Revenue laws, namely Respondent's attitude toward dentists, and in particular providers to medicaid patients. (Seventh cause of action). The Amended Complaint also makes similar allegations under the New York State Constitution; and alleges various pendant state law causes of action sounding in tort, including intentional infliction of mental distress, negligent infliction of mental distress, negligence, prima facie tort, and the violation of specific penal laws of the State of New York by virtue of Respondent's threat to the Petitioners.

Lower Court Orders:

The Amended Complaint (included in the Appendix hereto) was filed against both the

United States and Respondent Renison, in the U.S. District Court for the Western District of New York, in December, 1974. Upon motion of the defendants to dismiss, the action against the United States was dismissed by the Hon. Harold P. Burke, but sustained against Respondent Renison. Judge Burke, after deciding the motion, disqualified himself, and the case was transferred to the Hon. John T. Curtin in Buffalo. Respondent Renison then moved for summary judgment; and the motion was heard and denied by Judge Curtin by decision and order dated August 8, 1978. Thereafter, Respondent Renison moved the Court to reconsider its earlier decision. The Court granted the motion to reconsider, and by Order dated July 18, 1979, granted summary judgment in favor of Respondent Renison (included in the Appendix hereto).

The judgment was appealed to the Court of Appeals for the Second Circuit. By decision entered June 16, 1980, the Court of Appeals affirmed the judgment of the District Court; and by Order of July 28, 1980, the Court of Appeals for the Second Circuit denied the Petition of Petitioners for a rehearing.

The apparent bases for the decisions of both the District Court and the Circuit Court of Appeals are that no consitutional rights of the Petitioners were violated.

## BASIS FOR FEDERAL JURISDICTION IN DISTRICT COURT

The basis for federal jurisdiction in the District Court lies under 28 U.S.C. §1331, providing for the jurisdiction of the district courts over civil actions arising under the Constitution, laws, or treaties of the United States where the matter in controversy exceeds $10,000.

## ARGUMENT

1. Are the standards enunciated by the Supreme Court in Bordenkircher v. Hayes, 434 U.S. 357 (1978), governing the permissible scope of plea bargaining by a prosecutor, applicable in determining the constitutionality of Respondent Renison's threat to instigate a fraud investigation if Petitioner Foxman did not agree to Respondent's proposed deficiency?

The decision of the Second Circuit Court of Appeals states as follows, at page 3563,

> Appellants' next due process claim is that Renison threatened to reopen an earlier fraud investigation if they refused to agree to his proposed deficiencies. Assuming that this threat was made and made in bad faith, the district court nonetheless did not err in finding no constitutional violation. In Bordendircher v. Hayes, 434 U.S. 357 (1978), the prosecutor carried out a threat to reindict and convict the defendant under a recidivist statute if he refused to plead guilty to a lesser offense with which he was already

> charged. The Court held that there was no due process violation, stating that 'defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false-condemnation.' Id. at 363. The Court's reasoning is applicable here.

It is respectfully submitted that the decision of the Second Circuit Court of Appeals establishes a terribly dangerous precedent; pursuant to which, under the guise of prosecutorial discretion, revenue agents can intimidate taxpayers. The Supreme Court, in Bordenkircher, supra, emphasized the unique aspect of plea bargaining in a criminal context. The Court stated: "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." 434 U.S. 357, 363. There is no analogy here. This situation fits squarely into the admonition of the Supreme Court, in Bordenkircher, supra,

that "For an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" 434 U.S. 357, 363. Such an admonition is particularly relevant in situations where the citizen is not represented by counsel. Most people are not represented by counsel at the audit stage; and the Petitioners in this case were not.

The Supreme Court, in Bordenkircher, supra, stated: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." No one can seriously argue that that type of discretion should be vested in a revenue agent. If the agent believes there is fraud, he should

refer the case to the fraud unit. He is not vested with the authority to hang a sword of damocles over the head of a taxpayer, to gain leverage in his civil audit. In fact, in this case, the Government, in its brief to the Court of Appeals, stated the Respondent Renison was under instruction to refer the case to the Intelligence Division if he discovered evidence of fraud.

It should be noted that Petitioners place particular relevance upon the threat of Respondent, since as a result, a substantial delay occurred before Petitioners indicate that they developed the courage to appeal Respondent's findings to the conference level. During that interim period of time, Respondent was proceeding with another audit of Petitioners, levies were being made against Petitioners' property; and Petitioners allege they were subjected to substantial loss of income, disruption

of Petitioner Foxman's dental practice from which he has not recovered, and substantial mental and physical distress which continued thereafter.

2. Are Petitioners without a cause of action for damages under the Fifth Amendment, arising out of Respondent's conduct of the audit, in view of the fact that IRS review procedures were available to appellants to determine their correct tax liability?

The Court of Appeals has found that the allegations of Petitioners that Respondent Renison intentionally failed to reasonably investigate their tax liability, and intentionally failed to consider evidence proffered to him, do not give rise to a Fifth Amendment claim for damages, in view of the fact that IRS review procedures were available to appellants to determine their correct tax liability. (Decison, p. 3562). This holding is notwithstanding the fact

that the damage for which the Petitioners seek recovery (loss of business income, mental and physical suffering, etc.) is not the type of damage which was redressable through the IRS review procedure, and was allegedly being suffered by Petitioners despite the delayed availability of the IRS review processes.

The decision of the Court of Appeals brings into question the meaning of, and limits of, the Supreme Court's recent decisions in Davis v. Passman, 442 U.S. 228 (1979) and Carlson v. Green, 48 U.S. L.W. 4425 (April 22, 1980). Prior to Davis v. Passman, it appears that the trend of the Circuit Courts was to liberally imply a damage remedy directly from the Constitution, for violations of the Fifth Amendment. Quoting Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), the Circuit Court of Appeals for the 9th Circuit, in

Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928 (1977) stated:

> In Bivens it did not matter whether the availability of money damages was necessary to enforce the Fourth Amendment or whether there was prior congressional authorization for such a remedy. Instead, the Court framed the question as whether petitioner was 'entitled to redress his injury through a particular remedial mechanism normally available in the federal courts' .... Nothing in the language of Bivens or its rationale warrants a limitation solely to Fourth Amendment claims. The rights protected by the Fifth Amendment due process clause are as fundemental as Fourth Amendment rights. 558 F.2d 933, 941-942.

In Davis v. Passman, supra, the Supreme Court appears to have injected more caution into the question of whether damages for the violation of Fifth Amendment rights are appropriate in any particular circumstance, in particular by the Court's statement: "And, of course, were Congress to create equally effective alternative remedies, the need for damages might be obviated." 442 U.S. 228, 248. Shortly after the Passman

case was decided, the Circuit Court of Appeals for the Fifth Circuit, in the case of Bush v. Lucas, 598 F.2d 958 (1979), quoted the above sentence from Passman in denying relief in damages to a federal employee who was allegedly demoted unlawfully. The Court rested its decision on the grounds that there were administrative procedures before the Civil Service Commission affording potential relief to the claimant. The Court stated: "Thus we read Passman as not giving an optional remedy in addition to already sufficient remedies for wrongful action of a Government agent, but as an alternative when damages relief is needed." 598 F.2d 958, 961.

The Supreme Court, in Carlson v. Green, supra, appears to have eliminated questions which Passman generated, concerning the availability of alternative remedies, by indicating that unless Congress has ex-

plicitly provided an alternative remedy as a substitute for a Bivens type of suit, such a suit will not be foreclosed, absent "special factors counselling hesitation in the abscence of affirmative action by Congress." 48 U.S.L.W. 4225, 4426.

Nevertheless, the Second Circuit Court of Appeals, in its decision in this case, has stated (p. 3562) "It is undisputed, however, that the IRS review procedures were available at all times to appellants, and there is no dispute as to the amount finally determined to be owning. Under the circumstances, no constitutional rights were infringed...."

This finding can only be construed as indicating 1) that where procedural due process is at issue, a different standard than that of Carlson v. Green, supra, should be applied to the question of alternative remedies in determining whether a Bivens

type of suit may be brought or 2) that there are "special factors", relating to the investigation of tax liabilities, which militate against a Bivens type of action.

It is respectfully submitted that to posit administrative procedures, which determine a tax liability, as an adequate remedy for the personal and business harm to Petitioners (unrelated to tax liabilities) allegedly resulting from the Respondent's actions, is to unjustifiably limit Bivens, supra, as further amplified by Carlson v. Green, supra. Furthermore, it is submitted that there are no "special factors" which should insulate an internal revenue agent from the consequences of his illegal actions simply because taxes are involved or because there are adminstrative procedures available for the determination of one's tax liability.

Further clarification of this important area would seem desirable.

3. Does the deliberate violation of agency regulations, by Respondent Renison, raise a constitutional question of violation of due process?

The Amended Complaint alleges that Respondent Renison deliberately violated procedures of the IRS against successive audits by the same revenue agent of a taxpayer's returns. (Complaint, paragraph 25). The decision of the Court of Appeals, on page 3563, states: "The Foxmans' fourth claim is that Renison knowingly violated IRS procedures forbidding successive audits by the same agent. The record shows that Renison was directed by the IRS to audit the Foxmans' returns for four consecutive years (1968-71). Appellants have cited no authority that would support this as a constitutional claim and the Court has found none. See United States v. Caceres, supra, 440 U.S. 741."

It is submitted that the Court of

Appeals has too narrowly construed Caceres, supra. In that case, the Supreme Court was concerned with a good faith violation of regulations which did not prejudice the petitioner. The Court stated of the government agents,

> Their construction of their own regulations, even if erroneous, was not obviously so. That kind of error by an executive agency in interpreting its own regulations surely does not raise any constitutional questions. Nor is this a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency.

Where, as here, a regulation has been promulgated for the purpose of assuring fairness and impariality toward a taxpayer (as is the obvious purpose of a regulation against successive audits by the same agents), and where that regulation is deliberately violated, considerations of due process would appear to be present. In

this regard, it should be noted that the statement (above quoted) by the Court of Appeals that the IRS assigned Respondent Renison the returns for audit (also stated on page 14 of the Government's brief), is not necessarily inconsistent with the initiation of the audits by Respondent Renison. In fact, the Government's brief in the Court of Appeals (p. 14) indicates that Respondent Renison first became aware of Petitioner Foxman during the course of another investigation Respondent was undertaking. Therefore, it is obvious that Respondent did initiate one or more of the audits of Petitioners.

4. Was Petitioner Erwin Foxman deprived of liberty or property without due process of law if Respondent Renison intentionally caused the termination of a financing relationship between Petitioner Foxman and the First National Bank of Rochester?

As previously indicated, the Petitioners alleged in their Amended Complaint that Respondent Renison made demands for information upon the First National Bank of Rochester far in excess of his legitimate needs thereof, with the intention of harassing the bank and the Petitioners, and causing harm to the Petitioners; and that as a result of Repondent's activities, the bank terminated its arrangement with Petitioner Foxman.

The Court of Appeals for the Second Circuit found, under the authority of Board of Regents v. Roth, 408 U.S. 564 (1972), that Petitioner Erwin Foxman did not have a property interest meriting due process protection, in the absence of "a legitimate claim of entitlement to it." (Decision of Court of Appeals, p. 3564).

Assuming, arguendo, that Petitioner Foxman had no entitlement, vis-a-vis the

bank, to a continuation of his financing relationship beyond the pleasure of the bank, it appears nevertheless that Board of Regents v. Roth, supra, should be construed to protect the relationship from the arbitrary and malicious actions of a government agent. The Supreme Court stated, with respect to the definition of "liberty" (which, as well as "property", is afforded due process protection): "Without doubt, it ["liberty"] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life ...." (408 U.S. 564, 572).

In this case, it is precisely the freedom of Petitioner Foxman to contract, and to engage in his occupation, which was being interferred with by Respondent (maliciously and intentionally, it is alleged). The allegations of the Amended Complaint, as

described above, indicate the importance of this financing arrangement to Petitioner Foxman, in view of the nature of his practice, involving a high proportion of medicaid billings which were not paid promptly by the welfare authorities.

It can also be stated, as a reasonable extension of Board of Regents v. Roth, supra, that Petitioner Foxman possessed a "property" interest in the form of a right not to have his contractual arrangement with the bank wrongfully interferred with. The Supreme Court states, at 408 U.S. 564, 577,

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In New York State, it has been held by the highest court of the state that a party

to a contract has a right of action for damages against a third party who wrongfully induces the termination of that contract, even though the other party to the contract could have cancelled the contract at will. Lurie v. New Amsterdam Casualty Co., 270 N.Y. 379 (1936). In short, Petitioner Foxman had a property interest vis-a-vis Respondent Renison, even if he did not have one vis-a-vis the bank.

It is acknowledged that the foregoing concept of "property" may extend the current precedent in the area of those rights protected by the Fifth Amendment. However, in view of the importance of these rights, and the logic of construing the rationality of the Supreme Court's decisions to grant protection, we submit that this issue should be clarified.

It should be noted that the Court of Appeals for the Second Circuit indicated

that the officer of the bank who testified on deposition indicated, in "undisputed" testimony, that because only two doctors participated in the Medicaid factoring program of the bank, the bank decided to terminate the program as an unprofitable venture (Decision, p. 3564). However, the Court of Appeals also acknowledges that the repeated visits by the IRS were a part of the bank's decision to terminate Petitioner Foxman (Decision, p. 3564). Also, the affidavit of Lester Lempert, the "other" doctor, filed with the District Court (and included in the Appendix hereto), indicates that he voluntarily withdrew from the Program in late 1973 (18 months after Petitioner Foxman was terminated). Consequently, the reasons of the bank for terminating the Program, in late 1973, do not contradict allegations concerning Respondent Renison's role in the termination of Petitioner Foxman. In any event, this matrix is obviously one for

the trier of the facts.

5. Should absolute immunity be granted to Internal Revenue Agents from damage suits alleging violations of constitutional rights?

The Court of Appeals for the Second Circuit has effectively granted absolute immunity to Internal Revenue Agents from damage suits alleging violations of constitutional rights. As has hopefully been indicated by the previous portions of this Petition, colorable constitutional claims have been asserted. But they have been dealt with by the Court of Appeals in a manner which indicates that there is little or nothing that a revenue agent can do which would subject him to liability, absent actions beyond the very outside perimeters of his duties. In response to Petitioners' argument that they were singled out for audit, the Court of Appeals

totally sidestepped the allegation by stating that the IRS can investigate merely on suspicion that the law is being violated. (Decision, p. 3562). (Obviously, there is a limit to selective enforcement; see Bordenkircher v. Hayes, 434 U.S. 357, 364). In response to allegations that the Respondent had deliberately refused to consider proffered information and to otherwise conduct a fair and objective examination, the Court of Appeals stated that there was no claim because the IRS has procedures for appealing the actions of revenue agents. (Decision, p. 3562). In response to allegations that the Respondent threatened the Petitioner, the Court of Appeals extended to the Respondent the same absolute immunity which is accorded to prosecutors.

It is respectively submitted that it would be a tragic mistake to vest with absolute immunity agents who impact daily on

the lives of millions of American citizens. Yet, if the decision of the Court of Appeals in this case is to be upheld, a more truthful rationale would be that of absolute immunity rather than holding that no consitutional rights have been violated.

6. Have the Petitioners alleged valid causes of action, under state tort and constitutional law, against the Respondents; and if so, should these claims be tried by the District Court.

The Government's brief in the Court of Appeals (p. 10) makes clear its position that the state law claims of the Petitioners are barred under the doctrine of absolute immunity. The decisions of the Circuit Courts of Appeal, rendered since the decision of the Supreme Court in Butz et al. v. Economou, 438 U.S. 478 (1978), have interpreted Butz as confirming the doctrine

of absolute immunity of federal officials from all suits for damages based upon state tort law causes of action. See Evans v. Wright, 582 F.2d 20 (C.A. 5, 1978); Granger v. Marek, 583 F.2d 781 (C.A. 6, 1978). The latter case cites at length the landmark case of Gregoire v. Biddle, 177 F.2d 579 (C.A. 2, 1949), long thought to be the seminal case establishing absolute official immunity.

It is respectfully submitted that the Supreme Court, in Economou, supra, does not appear to have intended to absolutely insulate the acts of federal officials from state law claims, to the limits of the "outside perimeters" of their official duties, as indicated in Evans, supra, Granger, supra, and Gregorie v. Biddle, supra. The Court, in Economou, supra, stated that officials should be accountable "when they stray beyond the plain

limits of their statuatory authority." It is submitted that the allegations against Respondent Renison, particularly insofar as they relate to intentional violations of IRS procedures, intentional disregard of proffered evidence, and threats against Petitioners, stray beyond the limits of Respondent's authority, even though he was presumably acting within the "outer perimeter" of his duties as construed by Gregorie v. Biddle, supra, and its progeny. In particular, the standard of immunity should not over-protect Respondent Renison from his alleged violation of the state Constitutional rights of the Petitioners. It is submitted that in view of the continuing confusion in this area of official immunity that further clarification is necessary.

Assuming that valid state law causes of actions have been alleged (i.e., that they are not barred by absolute immunity),

it would appear that there is no question that they should be tried by the District Court, pursuant to the doctrine of pendant jurisdiction, if the federal constitutional claims are tried.

Even if it is found before trial, that the Petitioners have not stated a cause of action, under the Federal Constitution, upon which they can recover, it is still submitted that the District Court should consider the state law claims, and try those claims if they state valid causes of action. The Supreme Court has conclusively established that a federal district court has jurisdiction over a federal claim if the cause of action alleged is not so patently without merit as to justify the court's dismissal for want of jurisdiction. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). If the District Court has jurisdiction, it may

decide state law claims arising out of the same set of facts, even though it determines that the federal claims do not state a cause of action. Bell v. Hood, 327 U.S. 678 (1945); Hurn v. Oursler, 289 U.S. 238 (1932); Hagans v. Lavine, 415 U.S. 528 (1973). See also Taussig v. Wellington Fund, Inc., 313 F.2d 472 (1973).

This Court has indicated that pendant jursidiction is a doctrine of discretion, and further that if federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, that the state law claims should be dismissed as well. Mine Workers v. Gibbs, 383 U.S. 715 (1965). However, it is submitted that this case is a special one in that regard, in that the Respondent is a person who would be entitled, if the state-law claims were brought in state court, to remove to a federal court pursuant to 28 U.S.C. §1442(1).

That statutory provision permits removal by any officer of the United States or any agency thereof, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the collection of the revenue.

In view of the fact that were this case to be dismissed, and re-brought in state court, the Respondent would have the right to remove to federal court, judicial economy would dictate that these factors be considered before any state law claims are dismissed by the District Court.

# APPENDIX

(1)

ENTERED
JUNE 16, 1980

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 637—September Term, 1979

(Argued February 13, 1980 Decided June 16, 1980)

Docket No. 79-6165

ERWIN N. FOXMAN and EDITH C. FOXMAN,

*Plaintiffs-Appellants,*

v.

JOHN P. RENISON,

*Defendant-Appellee.*

Before:

OAKES and VAN GRAAFEILAND, *Circuit Judges*,
and TENNEY, *District Judge.**

Appeal from a summary judgment entered in the Western District of New York, John T. Curtin, *District Judge*, dismissing appellants' Fifth Amendment claims

* Of the United States District Court for the Southern District of New York, sitting by designation.

against an IRS agent for alleged misconduct during an audit of appellants.

Affirmed.

ERWIN N. FOXMAN, Rochester, N.Y. *Pro Se.*

JO ANN HORN, Tax Division, United States Department of Justice, Washington, D.C. (M. Carr Ferguson, Assistant Attorney General, Gilbert E. Andrews and Jonathan S. Cohen, Attorneys, of counsel), *for Defendant-Appellee.*

VAN GRAAFEILAND, *Circuit Judge*:

The question in this case is whether appellants have a Fifth Amendment cause of action against appellee, a former Internal Revenue Service agent, for alleged misconduct during an IRS audit of appellants. The district court held that they have not and granted appellee's motion for summary judgment. We affirm.

Appellant Erwin N. Foxman is a dentist who practices in Rochester, New York. Appellant Edith C. Foxman is his wife. In November 1970, the IRS commenced an audit of their 1969 tax return. Appellee John P. Renison, then an IRS agent, conducted the audit. After Renison determined that deficiencies existed for 1969, appellants' 1968 and 1970 returns were also assigned to him for audit. In May 1972, Renison completed his audits for these years and proposed deficiencies totaling $14,273.99 to which appellants agreed. Renison then audited appellants'

1971 return in order to bring it into conformity with the changes in their 1968, 1969 and 1970 returns.

At this point, the Foxmans requested a district conference to contest Renison's 1971 findings. As a result of this conference, appellants agreed to the assessment of an additional tax and negligence penalty for 1971 in the amount of $2,185.01. Although this was $2,388.86 less than the tax and penalty as computed by Renison, the difference was largely accounted for by substantial documentation of expenses that had not been examined by Renison during his audit and by a revision in the allowance for depreciation. Appellants then requested that adjustments similar to those made for 1971 be made in their 1968, 1969 and 1970 returns. After the returns for those years were adjusted, the tax deficiency was finally determined to be $7,897.68, to which was added a negligence penalty of $400.38.

Appellants did not appeal from the final determination of deficiency but instead commenced this action in the United States District Court for the Western District of New York. They sued Renison and the United States, alleging that Renison conducted his audits maliciously with a view to causing them injury and claiming both constitutional and state tort law violations. Judge Harold P. Burke dismissed the case against the United States but held that a claim might be stated against Renision under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The litigation was subsequently reassigned to Judge John T. Curtin who granted appellee's motion for summary judgment. Judge Curtin's opinion addressed only the merits of appellants' constitutional claims, and it is the merits of those claims that are urged on this appeal.

Appellants' first claim is that Renison singled them out for audit and for unfair treatment because of the agent's dislike for dentists, especially those who, like Dr. Foxman, deal extensively with Medicaid patients. Appellants allege that this disparate treatment violated their rights to equal protection of the laws. As the district court held, this claim is without merit. Renison's audit was conducted with the approval of his superior, and it is well settled that the IRS "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Powell,* 379 U.S. 48, 57 (1964) (*quoting United States v. Morton Salt Co.,* 338 U.S. 632, 642-43 (1950)); *United States v. Chemical Bank,* 593 F.2d 451, 456 (2nd Cir. 1979). Moreover, as in *Jacobson v. Organized Crime and Racketeering Section,* 544 F.2d 637, 640 (2nd Cir. 1976), *cert. denied,* 430 U.S. 955 (1977), the fact that the appellants' taxes were substantially understated gives their claim of selective audit a somewhat hollow sound.

Appellants' second contention is that Renison violated IRS procedures by refusing to consider information offered to him that would have substantiated appellants' claimed deductions. This conduct allegedly violated appellants' due process rights. There is an unresolved factual dispute as to whether this information was ever offered to Renison in intelligible form, or whether instead the Foxmans provided the necessary documentation in the first instance at the conference stage. It is undisputed, however, that the IRS review procedures were available at all times to appellants, and there is no dispute as to the amount finally determined to be owing. Under the circumstances, no constitutional rights were infringed even if there was a violation of

IRS regulations. *United States v. Caceres,* 440 U.S. 741 (1979).

Appellants' next due process claim is that Renison threatened to reopen an earlier fraud investigation if they refused to agree to his proposed deficiencies. Assuming that this threat was made and made in bad faith, the district court nonetheless did not err in finding no constitutional violation. In *Bordenkircher v. Hayes,* 434 U.S. 357 (1978), the prosecutor carried out a threat to reindict and convict the defendant under a recidivist statute if he refused to plead guilty to a lesser offense with which he was already charged. The Court held that there was no due process violation, stating that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false-condemnation." *Id.* at 363. The Court's reasoning is applicable here. Appellants were advised by their accountant that they were entitled to accept Renison's report and forestall a fraud investigation while preserving their rights to challenge the findings at the conference level. They ultimately chose that course of action, and substantially reduced their tax liability. Appellants' claim does not rise to the level of a constitutional violation.

The Foxman's fourth claim is that Renison knowingly violated IRS procedures forbidding successive audits by the same agent. The record shows that Renison was directed by the IRS to audit the Foxmans' returns for four consecutive years (1968-71). Appellants have cited no authority that would support this as a constitutional claim and the Court has found none. *See United States v. Caceres, supra,* 440 U.S. 741.

Appellants' final claim is that Renison intentionally destroyed a financing relationship between Dr. Foxman and a Rochester bank under which the bank advanced Foxman a percentage of his accounts receivable from Medicaid patients. Because the County Department of Social Services took several months to pay its Medicaid bills, the factoring arrangement was allegedly a valuable asset to Foxman's practice. Renison made several trips to the bank during his audits to examine documents and speak with bank personnel. The Foxmans contend that Renison's trips were in excess of his legitimate needs and were intentionally designed to harass the bank into cancelling the arrangement. The bank eventually decided to discontinue the financing, and a bank officer testified on deposition that the repeated visits by the IRS were a part of that decision. However, the officer also testified that Medicaid factoring was started by the bank as an experiment and, because only two doctors had participated in the program, bank management decided to terminate it as an unprofitable venture. This testimony is undisputed.[1]

A person does not have a property interest that merits due process protection unless he has "a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). There must be "rules or mutually explicit understandings that support his claim or entitlement," although understanding may arise from contracts that are either express or implied. *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972). In view of the bank's decision to terminate its Medicaid factoring program as unprofitable, Dr. Foxman had no

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1 The bank officer also testified that judgments against Dr. Foxman were being levied against his account.

legitimate claim of entitlement to his continued participation in that program of which he was unconstitutionally deprived.

The judgment appealed from is affirmed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

ERWIN N. FOXMAN and EDITH C. FOXMAN,

Plaintiffs

-vs- Civ-73-589

JOHN P. RENISON,

Defendant

---

APPEARANCES: ARTHUR L. STERN, III, ESQ.
Rochester, New York, for Plaintiffs.

RICHARD J. ARCARA, ESQ., United States Attorney (KENNETH A. COHEN, ESQ., Assistant United States Attorney, Buffalo, New York, and GERALD C. MILLER, ESQ., Trial Attorney, Tax Division, Department of Justice, Washington, D. C., of Counsel), for Defendant.

This action is a civil damage suit by the plaintiffs against an Internal Revenue Service agent, Mr. Renison, for violation of their constitutional rights in auditing plaintiffs' returns for the years 1968-71. On August 8, 1978, defendant's motion for dismissal or for summary judgment was denied on the basis of Butz v. Economou, 438 U.S. 478 (1978), and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). The court found that numerous issues of fact were raised by the

pleadings which could not be resolved on motion for summary judgment.

The defendant subsequently filed a supplemental motion for dismissal or summary judgment setting forth additional reasons for dismissing the complaint, or for reconsideration of the court's decision of August 8, 1978. Since matters outside the pleadings were considered by the court, the motion shall be treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Rule 12(b). For the reasons set forth below, summary judgment is granted to the defendant.

This action was commenced by a pro se complaint filed on November 30, 1973. Mr. Foxman subsequently retained an attorney and on December 23, 1974 filed an amended complaint. On motion of the government, Judge Harold P. Burke in December of 1975 dismissed the case against the United States but upheld the claim against defendant Renison on the authority of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). He then disqualified himself, and the case was assigned to my calendar.

The following facts are undisputed. The plaintiff, Erwin N. Foxman, is a dentist who has an office in Rochester, New York. A large number of his patients are

on Medicaid. He resides with his wife Edith, also a plaintiff, and they file joint tax returns. The plaintiffs' federal income tax returns for the years 1968-1971 were audited by the Internal Revenue Service [I.R.S.] and deficiencies were assessed for each of the years in question. Defendant Renison is the I.R.S. agent who audited the Formans' returns and who proposed the deficiencies. The complaint charges that Renison, in conducting the audit, committed a series of unauthorized acts designed to harass the plaintiffs, in violation of their rights under state tort law, I.R.S. procedures, and the fifth amendment.

According to facts set forth in defendant's affidavits and at no time contradicted by the plaintiffs, in 1970, the I.R.S. selected the plaintiffs' 1969 federal tax return for audit and assigned the audit to the defendant. Plaintiffs' 1968 and 1970 returns were subsequently assigned to the defendant as well. In May, 1972, the defendant completed the audit and proposed various income tax deficiencies for each of these years, to which the plaintiffs agreed. Between June and October of 1972, the defendant examined plaintiffs' 1971 return for the purpose of conforming it to the changes made in the 1968, 1969 and 1970 returns and proposed another deficiency. The plain-

tiffs then requested a district conference and as a result certain adjustments were made in their favor in the 1971 return. The tax deficiency finally agreed to for 1971 was $2,080.96 with a negligence penalty of $104.05.[1/] At plaintiffs' request, adjustments were subsequently made in the 1968, 1969 and 1970 returns to bring them into conformity with the 1971 adjustments and to allow certain deductions based on new substantiating evidence. The tax deficiency for 1968-1970 was finally determined to be $7,897.68 with a negligence penalty of $400.38.[2/] No further appeals were taken from these determinations.

In April of 1971, while the audit was being conducted by the defendant, the case was referred to the Intelligence Division of I.R.S. for possible criminal prosecution. It was continued as a joint investigation until January of 1972, when the case was returned to the audit division with instructions from the special agent who had been handling the case to notify the Intelligence Division if any evidence of fraud was disclosed during subsequent examination.

The complaint alleges that the plaintiffs were singled out for audit on the basis of improper criteria,

including Renison's dislike for dentists and for Medicaid providers. It also alleges that defendant's recommendation of deficiency was not substantiated by "a reasonably thorough and objective investigation" and that due to his improper motives the defendant failed to consider records and other information offered by the plaintiffs and failed to fairly evaluate those records he did consider. These actions allegedly violated the plaintiffs' right to equal protection under the fifth amendment as well as I.R.S. procedures.

The complaint also alleges that the defendant violated plaintiffs' due process rights under the fifth amendment by threatening to refer their case to the Intelligence Division for possible criminal prosecution if they appealed his deficiency recommendations for the 1968-1970 taxable years. The plaintiffs claim that the defendant harassed their bank by requesting unnecessary records on numerous occasions and, as a result, the bank finally terminated its financing arrangement with Mr. Foxman. They claim that the defendant violated I.R.S. procedures prohibiting a single tax agent from conducting two or more successive audits of the same taxpayer.

In addition to constitutional violations and violations of I.R.S. procedures, the complaint alleges that the actions outlined above entitle them to recover under assorted state tort theories, including negligent infliction of severe mental distress, negligent injury to business, prima facie tort, and intentional commission of the state crimes of coercion, obstruction, and harassment. 3/ Damages are requested for injury to business and for pain and suffering.

The government urges the court to find that the defendant is entitled to absolute immunity under the "special functions" doctrine enunciated in Butz v. Economou, supra. The general rule established in Economou is that "in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to . . . qualified immunity . . .." Id. at 507. An exception exists only in the unusual situation in which "absolute immunity is essential for the conduct of the public business." Id. This requires a particularized inquiry into the functions the official performs and a balancing of the harm to the individual citizens if they are unable to bring suit for constitutional violations against the threat to effective governmental functioning

if liability is imposed. In my decision of August 8, 1978, I found that the government had not shown that absolute immunity should attach.

The recent cases cited by the government do not provide a basis for changing my original decision. In Evans v. Wright, 582 F.2d 20 (5th Cir. 1978), the court found that Health, Education and Welfare [H.E.W.] program integrity specialists were immune from suit for allegedly tortious acts within the scope of their official duties. Since no constitutional causes of action had been asserted against the defendants, summary judgment was granted to the defendants. Granger v. Marek, 583 F.2d 781 (6th Cir. 1978), similarly involved a complaint in which the only claims against the defendants were common-law torts. The complaint alleged that I.R.S. agents tortiously interfered with the plaintiff's business of preparing tax returns and intentionally inflicted mental and physical distress. The Sixth Circuit, recognizing that qualified immunity is the general rule established in Economou, upheld dismissal of the complaint because no constitutional claims were alleged. The present case alleges constitutional violations and is therefore distinguishable from Evans and

Granger.

The government also cites Tique v. Swain, 585 F.2d 909 (8th Cir. 1978), in which the defendant, a military officer, was responsible for evaluating the medical condition of air force personnel handling nuclear weapons and removed the plaintiff pursuant to his authority because he believed the plaintiff was emotionally unstable. The court found that under the particular circumstances involved the defendant was entitled to absolute immunity but refused to find that military officers acting within the scope of their duties are generally entitled to absolute immunity under the "special functions" doctrine. Tique presented circumstances which are plainly distinguishable from this case.

Recognizing that I.R.S. agents are not automatically entitled to absolute immunity, the question nevertheless remains of whether the allegations in the complaint state a claim directly under the Constitution, giving the court jurisdiction over the complaint under 28 U.S.C. §1331(a). Many of the causes of action in the complaint are framed solely in terms of common-law torts. The only possible basis for federal court jurisdiction over these state law claims is the doctrine of pendent jurisdiction,

which presupposes the existence of a colorable federal claim. Thus, if no constitutional claim is stated, the court has no jurisdiction over the complaint.

In Davis v. Passman, 47 U.S.L.W. 4643 (U.S. June 5, 1979), the Supreme Court found that a private cause of action may be implied directly under the due process clause of the fifth amendment to redress sex discrimination in employment. Extending the rationale of Bivens, supra, beyond the fourth amendment, the court employed a three-step analysis to determine whether a cause of action was alleged. The first step is to ask whether the complaint asserts a constitutionally protected right. The court must then proceed to determine whether a cause of action is stated asserting that right and whether the relief requested is an appropriate remedy.

Davis v. Passman makes clear that a cause of action may be alleged directly under the fifth amendment. However, upon reviewing the fifth amendment claims alleged in the complaint, I find that the plaintiffs have not asserted any constitutional violations. Summary judgment for the defendant is therefore appropriate. Hernandez v. Lattimore, No. 78-2098 (2d Cir. June 7, 1979).

The constitutional violations alleged in the complaint consist of the following claims: (1) the defendant was motivated to select the Foxmans for audit and to propose tax deficiencies for improper reasons, including his dislike for dentists and for Medicaid providers; (2) in conducting the audit, the defendant failed to consider and evaluate all of the information available to him on an objective basis and expressly refused to consider certain relevant information offered to him by the plaintiffs; (3) in May of 1972, knowing that the Intelligence Division had already reviewed the Foxman case for possible fraud prosecution and decided to take no action, the defendant threatened to prosecute the plaintiffs for tax fraud if they did not agree to his proposed deficiency findings; and (4) during the investigation, the defendant intentionally and unnecessarily harassed plaintiff's bank, resulting in termination of the financing arrangement for his dental practice.

The plaintiffs have not, despite ample opportunity, cited any authority in support of their claim of constitutional violations. They simply state in conclusory terms that "[t]hese allegations raise serious constitutional questions and support the constitutional as well as tortious

allegations of the complaint." (Plaintiffs' memorandum of Feb. 9, 1979, at 7.)

It is well established that the I.R.S. need not make a showing of probable cause or reasonable suspicion before it audits a taxpayer. See, e.g., Foster v. United States, 265 F.2d 183, 186 (2d Cir. 1959). Congress has directed the Secretary of the Treasury to "cause officers or employees of the Treasury Department to proceed . . . and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax ...." 26 U.S.C. §7601. To this end, the I.R.S. has been given broad authority to examine records and witnesses "[f]or the purpose of ascertaining the correctness of any return ...." Id. §7602. Although this power is subject to the prohibition against "unnecessary examination or investigations" of taxpayers, id. §7605(b), this provision has been narrowly construed to prevent repetitive examinations and investigations not relevant to possible tax liability and not to require a showing of cause. See, e.g., United States v. Powell, 379 U.S. 48, 52-57 (1964); United States v. Davey, 543 F.2d 996, 1000 (2d Cir. 1976). As a general rule, a taxpayer's return can be audited to determine whether more tax is due without any cause at all.

See, e.g., DeMasters v. Arend, 313 F.2d 79, 88 (9th Cir. 1963). Complaints charging discriminatory selection for audit have generally been dismissed. See, e.g., Jacobson v. Organized Crime & Racketeering Section, 544 F.2d 637, 640 (2d Cir. 1976); United States v. Silkman, 543 F.2d 1218, 1220 (8th Cir. 1976); White v. Boyle, 538 F.2d 1077, 1080 (4th Cir. 1976).

The claim of selective audit has a particularly "hollow sound" when the taxpayers do not dispute their liability for taxes. Jacobson v. Organized Crime & Racketeering Section, supra. The Supreme Court has stated that it is the institutional good faith of I.R.S. which is at issue, not the motives of an individual agent. United States v. LaSalle National Bank, 437 U.S. 298 (1978). The complaint does not allege any bad faith on the part of I.R.S. and therefore is deficient on its face.

The second claim similarly fails to state a constitutional violation. The conduct complained of concerns defendant's conclusion as to the extent of plaintiffs' tax liability made in the course of his official capacity as a revenue agent. The Internal Revenue Code contains provisions for administrative and judicial review of deficiency

findings. At each stage in the review process, the taxpayer has the option of accepting the agency's determination or seeking review at a higher level. In this case, the plaintiffs requested a conference on their 1971 tax return, submitted additional material, and reduced their tax deficiencies. They also successfully sought an adjustment of their 1968-1970 returns. But they then elected to accept the agency's determinations rather than seek further review. Having failed to utilize the procedures specifically designed to resolve such disputes, the plaintiffs cannot at this point attack the manner in which the audit was conducted and claim that they were denied due process.

The plaintiffs have not cited any authority for finding that the third constitutional cause of action states a claim. When a taxpayer fails to report his income, the I.R.S. is entitled to consider whether criminal prosecution would be appropriate. The fact that in this case the plaintiffs' situation was already reviewed by the Intelligence Division is not determinative. The Intelligence Division expressly instructed the Audit Division to contact it again if additional evidence of fraud

was uncovered. Moreover, bargaining with the taxpayer in an effort to reach agreement on the amount of deficiency is an accepted I.R.S. tactic.

Even assuming that the threat was unwarranted or made in bad faith, it does not rise to the level of a constitutional violation. Moreover, the plaintiffs have not shown that they suffered any injury as a result; their 1968-1970 returns were later adjusted in their favor.

Finally, the claim that defendant harassed plaintiffs' bank does not state a constitutional violation. No recognized constitutional right is clearly articulated. In Davis v. Passman, supra, the Supreme Court had no difficulty finding that under prior case law the plaintiff had a federal constitutional right under the equal protection clause to be free from gender discrimination. However, there are no cases establishing a constitutional right, protected by the due process or equal protection clause, to a financing arrangement with one's bank free from interference from a government agent.

The only remaining question is whether a federal cause of action should be implied for failure to comply with I.R.S. procedures. It is clear that violations of I.R.S.

regulations do not automatically confer rights on the taxpayer. United States v. Arthur Anderson & Co., No. 79-6002 (2d Cir. Feb. 27, 1979). Nor do they normally raise constitutional questions. United States v. Caceres, 47 U.S.L.W. 4349 (U.S. Apr. 2, 1979). The plaintiffs have not shown how their constitutional rights were violated in this case and I refuse to so find.

The Clerk is directed to enter judgment in favor of the defendant.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: July 18, 1979

FOOTNOTES

1/ The defendant originally calculated a statutory deficiency for 1971 of $4,356.07 with a negligence penalty of $217.80. See Ex. A-10(c) to to defendant's memo filed July 19, 1976.

2/ The original deficiency for these years computed by the defendant was as follows:

| | STATUTORY DEFICIENCY | PENALTIES |
|---|---|---|
| 1968 | $ 1,685.33 | $ 84.27 |
| 1969 | 8,916.47 | 445.82 |
| 1970 | 3,672.19 | 183.61 |
| TOTAL: | $ 14,273.99 | $ 713.70 |

See Ex. A-8 to defendant's memo filed July 19, 1976.

3/ The complaint also alleges a violation of 28 U.S.C. §1346(b), the Federal Tort Claims Act. However, since a claim under this section can only be brought against the United States, which has already been dismissed from this case, and not against individual government officials, this claim must be dismissed. The plaintiffs do not seriously contend otherwise.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERWIN N. FOXMAN and EDITH C. FOXMAN,

Plaintiffs

v.

JOHN P. RENISON,

Defendant Civ-1973-589

SIR: Take notice of an ORDER & JUDGMENT of which the within is a copy duly granted in the within entitled action on the 18th day of July, 1979, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 19th day of July, 1979.

Dated: Buffalo, New York

July 19, 1979

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: Arthur L. Stern III, Esq.
Attorney for Plaintiff

TO: Richard J. Arcara, Esq. (Kenneth A. Cohen, Esq.)
Gerald C. Miller, Esq.
Attorney for Defendant

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

JUDGMENT ON DECISION BY THE COURT (CIV 32 (7-63))

# United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. Civ-1973-589

ERWIN N. FOXMAN and EDITH C. FOXMAN

vs.

JOHN F. RENISON

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable JOHN T. CURTIN, United States District Judge, presiding, and the issues having been duly ~~heard~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the complaint be dismissed.

Dated at Buffalo, New York, this 19th day of July, 19 79.

JOHN K. ADAMS
Clerk of Court

(4)

# United States Court of Appeals

## SECOND CIRCUIT

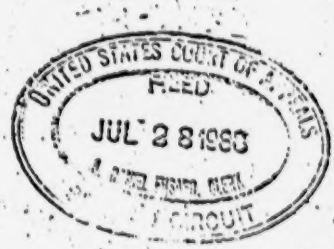
At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of July , one thousand nine hundred and eighty.

Present:

HON. JAMES L. OAKES,

HON. ELLSWORTH A VAN GRAAFEILAND,
Circuit Judges

HON. CHARLES H. TENNEY,
District Judge




ERWIN N. FOXMAN and EDITH C. FOXMAN

Plaintiffs-Appellant

v.

JOHN P. RENISON

Defendant-Appellee

79-6165

A petition for a rehearing having been filed herein by counsel for the Pro-se Erwin N. Foxman and Edith C. Foxman

Upon consideration thereof, it is

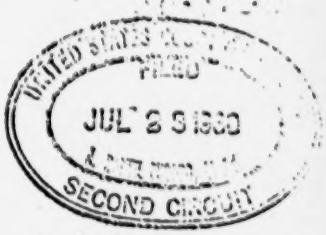
Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

(5)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of July , one thousand nine hundred and eighty.




----------X

ERWIN N. FOXMAN and EDITH C. FOXMAN,

Plaintiffs-Appellants,

v.

JOHN P. RENISON,

Defendant-Appellee.

79-6165

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellants pro se Erwin N. Foxman and Edith C. Foxman and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Wilfred Feinberg

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

| | |
|---|---|
| ERWIN N. FOXMAN and<br>EDITH C. FOXMAN<br>Plaintiffs<br>-vs-<br>UNITED STATES OF AMERICA<br>JOHN P. RENISON<br>Defendants | AMENDED<br>COMPLAINT<br>Index No. |

PRELIMINARY STATEMENT

1. This action is here brought against the United States of America, and against an Internal Revenue Agent, John Renison, in his individual capacity, for damages inflicted upon the plaintiffs during the course of and arising out of an investigation of plaintiffs' tax liabilities. Plaintiffs claim that the activities of Agent Renison were both intentionally tortious and neglige under the laws of New York, and violative of the plaintiffs' rights to due process and equal protection of the laws pursuant t the Fifth Amendment to the Constitution of The United States.

JURISDICTION

2. The Court has jurisdiction of this action under Section 134 (b) of Title 28 of the United States Code (known as the Tort Claims Act), which provides for the jurisdiction of the district courts over actions against the United States, exclusive of amount in controversy, where the claim involves injuries caused by the negligent or wrongful acts of an employee of the Government while acting within the scope of his office, under circumstances where the United States, if a private person, would be liable to the

claimant in accordance with the law of the state where the acts occured.

3. The Court also has jurisdiction of this action under Section 1331 of Title 28 of the United States Code, which provides for the jurisdiction of the district courts over actions arising under the laws or Constitution of the United States, where the amount in controversy, exclusive of interest and costs, exceeds $10,000. The amount in controversy in this action, exclusive of interest and costs, exceeds $10,000.

PLAINTIFFS

4. Plaintiffs Erwin and Edith Foxman are 52 and 57 years of age, respectively, and reside at 551 Genesee Street, Rochester, New York. They have been lawfully married since 1965.

5. Plaintiff Erwin Foxman is a doctor, licensed to practice dentistry in the State of New York. He has been so licensed since 1952, and has practiced dentistry in this state since that time.

6. In 1966, the plaintiffs established their current residence at 551 Genesee Street; and at the same time, Plaintiff Erwin Foxman moved his office for the practice of dentistry to the same address. Plaintiff Erwin Foxman has practiced dentistry at 551 Genesee Street since that time.

7. The location of plaintiffs' residence, and the office of plaintiff Erwin Foxman, is in the Nineteenth Ward of Rochester, and in the midst of an area predominantly inhabited by persons of low income and economic means. As a result of the foregoing, plaintiff Erwin Foxman's dental practice between 1967 and the middle of 1974 was predominantly in the service of persons and

families receiving welfare in the form of medical assistance from the County of Monroe. Dr. Foxman has billed the County of Monroe directly for these services."

8. During the years 1968 - 1972, Dr. Foxman enjoyed a gross income and an adjusted gross income (gross income less work related expenses) from his dental practice of approximately the following amounts, respectively:

| | Gross Income | Adjusted Gross Income |
|---|---|---|
| 1968 | $43,100 | $26,500 |
| 1969 | 61,700 | 30,200 |
| 1970 | 84,300 | 31,100 |
| 1971 | 131,400 | 34,500 |
| 1972 | 123,500 | 62,200 |
| 1973 | 83,300 | 44,400 |

Approximately two-thirds of said income, in each year, arose from services to welfare recipients.

9. Due to the exagerated conditions of deterioration existent in the mouths and teeth of low income persons, plaintiff Erwin Foxman performed a substantial amount of prosthetic work (bridges and dentures) on his welfare recipient patients. His gross income for such services during the years 1971 and 1972 was approximately $40,000 per year, and his adjusted gross income (gross income less work related expenses) from such services was approximately $25,000 per year.

10. In order to receive payment for his services to welfare recipients, Dr. Foxman has, over the years, rendered bills to the County of Monroe, pursuant to the federal-state medicaid program. On the average, bills rendered for routine dental services have been processed and paid in approximately three to four months from the date said bills are rendered.

11. Although the length of time for the payment of bills by the

County has been as set forth in the previous paragraph, the services rendered to medicaid patients by Dr. Foxman has required the immediate outlay of expenses by him, particularly for fees paid to independent laboratories in the production of dental prosthetics.

12. As a result of the foregoing, Dr. Foxman has found it essential to have an appropriate financing arrangement with a local financial institution that would enable him to carry large receivables for dental prosthetic work rendered for medicaid recipients, while incurring immediate substantial expenses in the rendering of such services.

13. In or about 1969, Dr. Foxman and the First National Bank of Rochester entered into a financial arrangement under which the bank, upon assignment of medicaid accounts receivable as collateral, would lend to Dr. Foxman 80% of the face amount of said receivables. This financial arrangement continued until approximately March of 1972, when the said bank discontinued said arrangement as a result of the investigations which were then being conducted, and had for the past year and a half been conducted, by the Internal Revenue Service, and by defendant Renison in particular, into the financial affairs of the plaintiffs, involving continual and extensive investigation into bank records of the First National Bank.

14. As a result of the bank's termination of the aforesaid financial arrangement, plaintiff Erwin Foxman was forced to discontinue performing prosthetic work on medicaid patients, commencing at or about the beginning of January, 1973. Between that time and July of 1974, when the Internal Revenue Service

seized and closed down plaintiff Erwin Foxman's dental office, his billings to the County Social Services Department were reduced by approximately $40,000/ annum, constituting the level of prosthetic services for medicaid patients performed by plaintiff Foxman in 1972, as a result of his inability to perform such services thereafter.

15. Plaintiff Erwin Foxman was allowed by the Internal Revenue Service, on or about August 26, 1974, to reopen his office for the practice of dentistry; but he continues to be unable to perform prosthetic work on medicaid patients, as he is unable to finance the cost of performing such services without appropriate bank financing. Upon information and belief, the First National Bank is the only bank which has offered and/or continues to offer such an arrangement to dentists; and said bank continues to be unwilling to resume such an arrangement with Dr. Foxman as a result of the inconvenience and harrassment to which the bank was subjected between November of 1970 and March of 1972 by the investigations of Agent Renison.

DEFENDANTS AND FACTS

16. Plaintiffs bring this action against both the United States of America and against an employee thereof, one John P. Renison, Internal Revenue Service agent.

17. Upon information and belief, Defendant Renison has been an employee of the United States, with the position of Internal Revenue Service agent, from on and before November 1970 up until the present time. It is and has been his responsibility, in that position, to audit tax returns of taxpayers in accordance with

establishes rules and procedures of the Internal Revenue Service and in accordance with standards of general reasonableness: and in which position it is, and has been his responsibility to apply those procedures and standards, and the tax law as interpreted for him by his superiors, to the facts of each taxpayer's case.

18. In his capacity as Internal Revenue Service agent, defendant Renison undertook, commencing in or about November, 1970, to investigate the tax returns of plaintiffs for the year 1969.

19. Commencing in the year 1971, defendant Renison, in his capacity as an Internal Revenue Service agent, also undertook to investigate the tax returns of plaintiffs for the years 1969 and 1970.

20. Defendant Renison continued and intensified his audit investigation of plaintiffs' tax returns for the years 1969, 1969 and 1970 into and throughout the first half of 1972, completing his investigation for said years in or about June, 1972.

21. Commencing in or about September of 1972, defendant Renison, in his capacity as an Internal Revenue Service agent, also undertook to investigate the tax returns of plaintiffs for the year 1971, and he completed said audit in or about October of 1972.

22. Agent Renison, upon information and belief, was not initially or thereafter assigned the returns of plaintiffs for audit, pursuant to random selection of returns or other procedure within the Internal Revenue Service for the assignment of returns to agents for audit; but instead selected the returns of plaintiffs on his own initiative for audit.

23. Upon information and belief, Agent Renison was motivated to initiate and pursue the investigation of the returns of plaintiffs through reading one or more periodic newspaper articles, listing doctors who had rendered bills to the County Social Services

Department, including the name of Dr. Foxman and the amount he had billed. Upon information and belief, newspapers of general circulation in Monroe County, New York, publish such an account of providers, and amounts billed, once or more times a year.

24. Agent Renison, upon information and belief, pursued his investigation of plaintiffs' tax returns for the years 1968 and 1969, and thereafter, because he possessed a significant adverse feeling toward dentists and their fees, and in particular practitioners who rendered large bills to the County Social Services Department, including Dr. Foxman.

25. Agent Renison, upon information and belief, by investigating the returns of plaintiffs for all years, 1968-1971, knowingly violated procedures of the Internal Revenue Service against successive audits, by the same Internal Revenue Service agent, of one taxpayer's returns.

26. Agent Renison, upon further information and belief, knowingly violated procedures of the Internal Revenue Service requiring reasonable investigation and consideration of records and other sources of information proferred by the plaintiffs to support claimed deductions on their federal income tax returns for the years 1968 through 1972.

27. Agent Renison, upon information and belief, was negligent in failing to reasonably investigate and consider records and other sources of information proferred by the plaintiffs in support of claimed deductions on their federal income tax returns for the years 1968 through 1972.

28. Agent Renison, upon further information and belief,

intentionally failed to reasonably investigate and consider records and other sources of information provided by the plaintiffs in support of claimed deductions on their federal income tax returns for the years 1968 through 1972, and intentionally and willfully sought thereby to cause mental and financial harm and injury to the plaintiffs without just or reasonable cause or excuse therefor.

29. As alleged heretofore, defendant Renison completed his investigation of plaintiffs' income tax returns for the years 1968, 1969 and 1970 in or about June, 1972. In or about June, 1972, Agent Renison specified in a Form 4549 his recommended disallowances of deductions claimed by the taxpayers on their federal income tax returns for the years 1968, 1969 and 1970. As specified in more detail in succeeding paragraphs defendant Renison specifically disallowed claimed deductions in disregard of and notwithstanding records available to him, and notwithstanding and in disregard of records and information proferred to him by the plaintiffs during the course of his audits.

30. In or about June of 1972, Agent Renison attempted to secure plaintiffs' consent to his recommended disallowances for the years 1968 - 1970. When plaintiff Erwin Foxman indicated that he did not agree with the recommended disallowances and did not wish to execute a consent to said disallowances, Agent Renison specifically stated to plaintiff Foxman that if he and his wife did not consent and appealed to higher authority, the defendant would make it tough for on them and would press for a fraud charge against the plaintiffs. As a result of said illegal threat, plaintiffs signed their consent to the disallowances.

31. In or about September of 1972, as heretofore alleged,

defendant Renison conducted his audit of plaintiffs' income tax returns for 1971. His audit consisted of approximately two days of perusing records in the office of plaintiffs' accountant, during which time he intentionally violated procedures of the Internal Revenue Service by failing to reasonably pursue sources of information and verification. Specifically, he asked no questions of either plaintiffs' accountant or of plaintiffs in order to secure verification for claimed deductions.

32. In or about October of 1972, defendant Renison completed a Form 4549, recommending the disallowance of numerous deductions claimed by the taxpayers on their return for 1972. Defendant Renison sent said form to plaintiffs' accountant for plaintiffs' consent, and stated in a letter accompanying said form: "The records are still too difficult to go by and this is it."

33. As a result of defendant Renison's continued negligent and intentional failure to reasonably investigate sources of information available to him, to wit his failure to even talk with plaintiffs about his proposed disallowances for the year 1971, plaintiffs decided that they could nomlonger acquiesce to said behavior and in January, 1973 appealed defendant Renison's proposed findings to the "conference" level of the Internal Revenue Service, notwithstanding Agent Renison's previous threat.

34. As a result of conferences held with plaintiffs by Internal Revenue Service personnel during 1973 and 1974 as a result of said appeal, the tax deficiencies recommended by defendant Renison were finally reduced for 1960 - 1971 in the amount of approximately $8,000, but not before said amount had been collected from plaintiffs by way of seizure between December 1972 and April 1973

of accounts receivable owing to plaintiff Foxman from the Monroe County Department of Social Services.

35. Specifically, and without limitation on the foregoing, defendant Renison disallowed almost all depreciation claimed by plaintiffs for plaintiff Erwin Foxman's office and business equipment for the years 1968 - 1971. Plaintiff Erwin Foxman specifically offered, in & before the spring of 1972, to secure a qualified appraisal to support his allocation of the overall purchase price of his house and the equipment contained therein to the office portion of the house and to the dental equipment, in order to support the claimed depreciation deductions, and Agent Renison specifically indicated that to do so would be fruitless, and that he would not consider such an appraisal. Nevertheless, Agent Renison's form 4559 for the year 1971 indicated "Taxpayer had no proof that house and dental equipment were purchased with value of 10,000 placed on equipment and 14,000.00 for the house. The taxpayer had over a year to prove that his breakdown of house was correct." Upon appeal to the conference level, Agent Renison's disallowances were reversed to the extent of allowing taxpayers slightly more than $1,000 of depreciation for each year which had been disallowed by Agent Renison.-

36. Specifically, and again without limitation on the foregoing, Agent Renison, in computing plaintiffs' taxable income for the years 1969 and 1970, refused to accept the fact that certain receivables from the County of Monroe were discounted by plaintiff Erwin Foxman with Main Billing Service, and that therefore plaintiff Erwin Foxman received as income $1,356.03 less than the face amount of said receivables. Agent Renison refused to accept the

fact of such discounts, even though he examined books of Main Billing Service specifically showing such discounts, and even though he accepted the fact of discounts on other receivables shown on the same books of Main Billing Service. Furthermore, defendant Renison refused to examine plaintiff Erwin Foxman's individual patient cards, which plaintiff Foxman, in or about the spring of 1972, offered to defendant Renison, which showed the fact and amount of all discounted receipts in question. Upon appeal to the conference level, Agent Renison's refusal to recognize the aforesaid $1,356.03 of discounts was reversed.

37. Specifically, and again without limitation on the foregoing, defendant Renison refused to allow $510 and $2,579 constituting one-half of partnership losses suffered by plaintiff Erwin Foxman and his his 50-50 partner*, Lester Lempert, in connection with the breeding and racing of horses, although defendant Renison examined the books of the partnership located in the office of the accountant of plaintiff Foxman's partner, Lester Lempert, verifying said losses; and although Agent Renison in fact audited the partnership returns of plaintiff Foxman and Mr. Lempert and did not recommend disallowancesof the identical amount of losses claimed by Mr. Lempert for his half of the partnership. When plaintiff Foxman, in or about the spring of 1972, inquired of defendant Renison the reason for such disallowance, defendant Renison indicated that "someone" had told him that plaintiff Erwin Foxman had not paid for the horses; but defendant Renison specifically refused to name that "someone", in order to prevent plaintiff Foxman from confronting said witness and otherwise proving the legitimacy of his claimed loss deduction. Upon appeal to the conference level, Agent Renison's disallowance of these losses was reversed.



* in 1969 and 1970, respectively.

38. Specifically, and again without limitation on the foregoing, Agent Renison disallowed claimed capital losses from the sale of common stocks in the amount of $1,000 for each year 1969 and 1970. Upon plaintiff Erwin Foxman's profer of brokerage-house records to Agent Renison, in or about the spring of 1972, to substantiate his losses, Agent Renison replied "Throw them in the basket." Upon appeal to the conference level, said losses were allowed to the extent of $1,000 and $571.88 for the years 1969 and 1970 respectively.

39. Specifically, and again without limitation on the foregoing, Agent Renison refused to accept a claimed business deduction of plaintiff Erwin Foxman for $374 expended in the year 1970 for copying services rendered by Copy Van of Rochester, Inc. In this regard, Agent Renison refused to accept for examination a receipt of such expenditures signed by said vendor, although plaintiff Erwin Foxman offered said receipt to Agent Renison, in or about the spring of 1972. Upon appeal to the conference level, Agent Renison's disallowance was reversed.

40. Specifically, and again without limitation on the foregoing, Agent Renison refused to accept for examination plaintiff Erwin Foxman's proof, by way of a receipt, of $150 spent for business consulting services in 1970, although plaintiff Foxman offered such proof in or about the spring of 1972, in support of his claimed deduction. Upon appeal to the conference level, Agent Renison's disallowance was reversed.

41. Specifically, and again without limitation on the foregoing, Agent Renison refused to allow claimed losses from wagering on horse racing in the amount of $776.40 during the year 1969.

although plaintiff Erwin Foxman proferred to defendant Renison, in or about the spring of 1972, his specific tickets purchased at the race track showing such expenditures, and although plaintiffs had included on their income tax return for 1969 income from wagering in excess of the losses claimed. Upon appeal to the conference level, Agent Renison's disallowance was reversed.

42. Specifically, and again without limitation of the foregoing, Agent Renison refused to accept $235 of an amount of $270 claimed by plaintiffs on their income tax return for 1969 attributable to amounts paid to an accountant for preparation of their federal and state income tax returns, although plaintiff Erwin Foxman proferred to Defendant Renison, in or about the spring of 1972, a receipted bill as proof of such expenditures. Upon appeal to the conference level, Agent Renison's disallowance was reversed.

43. Specifically, and again without limitation on the foregoing, defendant Renison refused to accept other deductions claimed in the years 1968 through 1971, without proper and reasonable investigation into the records of the taxpayers, without examination of records proferred to the defendant by plaintiff Erwin Foxman, and without taking the time or making the effort to ask questions or seek verification from the taxpayers. Without limitation on the foregoing, Agent Renison increased plaintiffs' income for the year 1971 by $5,235.95, and disallowed deductions claimed in the amount of $5,979.00, consisting partially of business expenditures of Erwin Foxman itemized in his books but for which there were not specific invoices available, without even talking with the taxpayers or their accountant. Upon appeal to the conference level, Agent Renison's recommended deficiency of $4,356.07 in taxes for the year 1971 was reduced to $2,060.06.

44. Defendant Renison's actions, as above described, constituted negligence in failing to act prudently and reasonably in the examination of plaintiffs tax returns, constituted a conscious failure to follow mandated procedures of the Internal Revenue Service, and constituted actions intentionally and willfully designed without just and reasonable cause or excuse to inflict mental and financial damage upon plaintiffs.

45. In the course of his investigations of the tax returns of plaintiffs for the years 1968 - 1971, defendant Renison, during 1971 and up until some time in March of 1972, made continued visits to the First National Bank of Rochester, demanding information from the records of the bank concerning plaintiff Erwin Foxman, and serving subpoenas on the said bank for said information. Upon information and belief, defendant Renison served numerous subpoenas for information and made numerous demands for information throughout the year 1971 and during the first three months of 1972. These demands of information and subpoenas were far in excess of defendant Renison's reasonable needs for information in order to prudently verify sources and/or amount of income received by plaintiff Erwin Foxman during the ye years in question; and defendant Renison's continuing demands and subpoenas for information far in excess of his legitimate needs were intentionally, willfully and solely designed to harass the said bank and the plaintiffs, and to thereby cause harm and damage to plaintiffs. As a result of defendant Renison's aforesaid activities, the bank terminated its arrangement with plaintiff Erwin Foxman whereby it was factoring the medicaid accounts receivable of plaintiff Erwin Foxman, with the resultant damage to plaintiffs dental practice as set forth in more detail in paragraphs 14 and 15 above.

DAMAGES

46. Plaintiffs repeat and reallege herein the allegations of paragraphs 1 through 45 above.

47. As a result of the actions of defendant Renison which were willfully and intentionally designed to injure and damage plaintiffs, including defendant Renison's treatment of plaintiffs as if they were the scum of the earth, his refusal to accept proferred verification of claimed deductions, his threat to bring fraud charges against the plaintiffs, and his reports intentionally recommending deficiency assessments not supported by a reasonable and fair investigation, plaintiffs suffered and continue to suffer great fright, as a result of defendantss threats, and great nervousness and anxiety as a result of all of defendant Renison's actions as aforesaid.

48. Without limitation on the foregoing, as a result of the aforesaid actions of agent Renison, plaintiff Erwin Foxman has been in a state of constant nervous tention, anxiety, and instability, requiring him to take several grains of nembutal daily, from the middle of June of 1972 up to the present time. Plaintiff Erwin Foxman had suffered a nervous breakdown in 1959 for which he was hospitalized, and had been on sedatives between that time and 1965. However, between 1965 and the reoccurrance of nervous tension and anxiety caused by the malicious actions of defendant Renison, plaintiff Erwin Foxman had been free from nervous tension, had been off of medication, and had been able to build up a large and successful dental practice the scope of which is more fully set forth in paragraph 8 above.

49. Dr. Foxman's high state of nervous tension, anxiety, and instability from and after June of 1972, caused by the aforesaid actions of defendant Renison, has destroyed the domestic tranquility and loving nature which theretofore characterized his relationship with plaintiff Edith Foxman.

50. Dr. Foxman's high state of nervous tension and anxiety, from and after June of 1972, caused by the aforesaid actions of defendant Renison, has also caused him to lose manual coordination, and to be unable to approach his dental practice with the enthusiasm, organization, and energy which he theretofore possessed. As a result thereof, plaintiff Erwin Foxman has not been able to retain his 1972 patient level. His gross income during 1973 correspondingly fell by approximately $50,000,aand his adjusted gross income by approximately $30,000, from its 1972 level; and during the first half of 1974, plaintiff's level of gross income fell to 50% of that realized in 1972, and his adjusted gross income (gross income less work expenses) to 40% of that realized in 1972. Plaintiff Erwin Foxman's capacity to perform dental work has continued and will continue for the remainder of his career to be correspondingly diminished due to his nervous tension and anxiety resulting from the aforesaid actions of defendant Renison, constituting a continuing financial loss in the amount of $25,000 per year of adjusted gross income for the remainder of his career (age 65).

51. Dr. Foxman's continuous high state of nervous tension and anxiety, from and after June of 1972, caused by the aforesaid actions of defendant Renison, has been a constant source of anguish, unhappiness, mental pain and suffering and fatigue to plaintiff Erwin Foxman.

52. Plaintiff Edith Foxman, as a result of the actions of defendant Renison as aforesaid, has also been in a high state of

nervous tension and anxiety from June of 1972 up until the present time. As a result thereof, she has been experiencing weekly stomach cramps, and has been forced to take constant and continuing doses of librium to calm her nervous tension, during that entire period of time.

53. As a further result of defendant Renison's aforesaid actions, as well as the nervous tension which plaintiff Edith Foxman has suffered as a result thereof, plaintiff Edith Foxman has been constantly belligerent and irritable from and after June of 1972, thereby destroying the domestic tranquility and loving nature which theretofore characterized her relationship with plaintiff Erwin Foxman.

54. Plaintiff Edith Foxman's continuous high state of nervous tension and anxiety, from and after June of 1972, caused by the aforesaid actions of defendant Renison, has been a constant source of anguish, unhappiness, mental pain and suffering, and fatigue to her.

55. As a result of defendant Renison's activities, and most specifically his harassment of the First National Bank of Rochester through his continuing and unnecessary demands for information as aforesaid, plaintiff Erwin Foxman has been denied a sole source of financing enabling him to do dental prosthetic work for Medicaid patients; and as a result of his inability to do said work, he has lost gross income of $40,000 in each of the years 1973 and 1974, resulting in a loss of adjusted gross income of $25,000 in each of those years; and his adjusted gross income will continue to be reduced by $25,000 per year for the remainder of his career. Defendant Renison's demands on and harassment of the bank were designed, out of a malicious motive, to harm plaintiff Erwin

56. Further, defendant Renison's actions as aforesaid, and most particularly his reports, as set forth in paragraphs 29 and 32 above, intentionally recommending deficiency assessments atainst the taxpayers for the years 1968 through 1971, which were unsubstantiated by proper investigation, resulted in assessments and levies against the plaintiffs all to the great damage and harm of the plaintiffs.

57. More specifically, the Internal Revenue Service, prior to the reversal of a substantial portion of the deficiencies recommended by defendant Renison, made assessments against the plaintiffs in the full amount of the deficiencies recommended by defendant Renison. Pursuant to said assessments, the Internal Revenue Service served notices of levy on the Monroe County Department of Social Services. As a result of said notices of levy, the Monroe County Department of Social Services, between June of 1972 and March of 1973, paid over to the Monroe County Department of Social Services approximately $16,000 of accounts receivable owing by said agency to plaintiff Erwin Foxman for services rendered by Dr. Foxman to medicaid recipients.

58. More particularly, between December 26 of 1972 and the middle of April of 1973, the Monroe County Department of Social Services paid over toethe Internal Revenue Service all accounts receivable which it owed Dr. Foxman. Inasmuch as said accounts receivable constituted approximately two-thirds of the receivables which became due and owing to Dr. Foxman during that period from all sources, and due to the fact that it was necessary for Dr. Foxman to apply his gross income which was not seized against expenses

incurred in the production of his gross income which was seized, plaintiff Foxman received substantially no net income from December 26, 1972 to the middle of April 1973.

59. If defendant Renison had fairly and reasonably investigated the tax returns of plaintiffs for the years 1968 through 1971, the tax liabilities assessed would thereby have been lower by at least $3,000, and plaintiffs would have been able to secure necessary funds to voluntarily pay taxes due and owing to the federal government. Plaintiffs were not, however, willing or able to secure the amount of taxes assessed as a result of the unreasonable and malicious reports of defendant Renison. As a result of the levies which were executed by the Internal Revenue Service pursuant to said assessments, and in particular as a result of plaintiffs' lack of any net income during the first three and a half months of 1972, plaintiff Erwin Foxman found it impossible to continue the same level of practice which he had built through 1972. In particular, plaintiff lacked the necessary cash flow to support expenditures for laboratory fees, office help, and materials incurred in rendering a high volume of medicaid dental services. By consequence, during the year 1973 plaintiff Erwin Foxman was forced to reduce the scope of his dental practice by $50,000 in gross income from his 1972 level, and by $30,000 in adjusted gross income from his 1972 level; and during the first half of 1974, to a level of 50% of his 1972 gross income, and 40% of his 1972 adjusted gross income. Plaintiff Erwin Foxman is not able to recapture his medicaid dental practice which he reduced in response to his cash flow problems stemming from the levies. His former patients are now the patients of other dentists, and it is not reasonably possible or practical for Dr. Foxman to regain said practice, due to his age, consequently, his adjusted gross income continues, and will continue for the remainder of his career, to be reduced by at least $25,00 per year.

60. As a further result of the aforesaid levies, which were the consequence of defendant Renison's malicious and unjustified investigations and audit reports, plaintiffs were unable to pay their taxes for 1972, at the time of filing their tax return for that year on or about April 15, 1973; said inability stemming from the fact that by virtue of the Internal Revenue Service levies on plaintiff Erwin Foxman's accounts receivable between December 26, 1972 and the middle of April 1973, plaintiffs were left with no net cash during that period with which to pay 1972 taxes.

61. As a result of plaintiffs' inability to pay their taxes for 1972, due to the levies by the Internal Revenue Service caused by the unjust and excessive deficiency found by defendant Renison for the years 1968-1971, the Internal Revenue Service made a further levy to collect said 1972 taxes by seizing the house of plaintiffs and lockinggplaintiff Erwin Foxman out of his office, located therein, on or about July 5, 1974.

62. As a result of the seizure by the Internal Revenue Service of plaintiff Erwin Foxman's office, stemming as aforesaid from plaintiffs' difficulties arising as a result of defendant Renison's malicious actions, plaintiff Erwin Foxman's dental practice was totally and completely terminated, and he was forced to assign his patients to other dentists. Plaintiff is unable to regain the very large majority of the patients he lost; resulting in a loss of gross income of $30,000 and adjusted gross income of $20,000 during the last half of 1974, over and above loss of income previously alleged in this complaint. It is not reasonably practical or possible for Dr. Foxman to regain a large part of said practice, due to his age, health, and the very long hours (30 hours per week, including weekends and evenings), required to develop or expand a medicaid practice; and his adjusted gross income will therefore be lower by $20,000 per year, during the remainder of his career, over and above loss of income previously alleged in this complaint.

63. The aforesaid deficiency reports, levies, seizure of plaintiffs' hours, and harassment of the First National Bank, have also done great damage to the reputation and standing of plaintiff Erwin Foxman in the community, resulting in a loss of $10,000 in gross income and $6,250 in adjusted gross income in 1973, and $25,000 in gross income ($16,500 in adjusted gross income) in 1974. Said damage to plaintiff's reputation and standing in the community will continue to depress his income by amounts as great and greater than the above-stated amounts for 1974.

64. As a result of the foregoing, plaintiffs claim the following damages: $770,000 as compensatory damages for the past and continuing damage which has been done to plaintiff Erwin Foxman's dental practice; $500,000 for the fright, nervousness, anxiety, pain and suffering, as aforesaid, caused by defendant Renison to plaintiff Erwin Foxman; and $500,000 for the fright, nervousness, anxiety, pain and suffering, as aforesaid, caused by defendant Renison to plaintiff Edith Foxman. The Internal Revenue Service has failed to act upon plaintiff's claim for said amounts made in January, 1974.

FIRST CAUSE OF ACTION

65. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-64 above.

66. Pursuant to Section 1346(b) of Title 28 of the United States Code, the United States is subject to suit in the federal district courts for money damages for injury or loss of property, or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, in accordance with the law of the place where the act or omission occured.

67. Defendant Renison, in the actions undertaken by him as aforesaid, was acting in relation to duties assigned to him by his superiors within the Internal Revenue Service, and was correspondingly acting within the scope of his employment within the scope of his employment within the meaning of Section 1346(b) of Title 28 of the United States Code.

68. The actions of defendant Renison, as aforesaid, were part of a deliberate and malicious effort of harassment and intimidation and designed to cause plaintiffs severe emotional and mental

distress and suffering.

69. The actions of defendant Renison, as aforesaid, constituted the tort of intentional infliction of severe mental distress and suffering under the laws of New York, causing damage as stated above to each plaintiff of $500,000 for the fright, nervousness, anxiety, pain and suffering caused each plaintiff, which damages are recoverable under said laws of New York.

70. Defendants John P. Renison and the United States of America are therefore jointly and severally liable to the plaintiffs for said damages, amounting to $500,000 in the case of plaintiff Edith Foxman and $500,000 in the case of plaintiff Erwin Foxman.

SECOND CAUSE OF ACTION

71. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-70 above.

72. The actions of defendant Renison, as aforesaid, constituted imprudent and unreasonable methods of investigation, in view of their likely and resultant effect of causing severe and unjustified mental and emotional distress and suffering to plaintiffs.

73. The actions of defendant Renison, as aforesaid, constituted the tort of negligent infliction of severe mental distress and suffering under the laws of New York, causing damage as stated above to each plaintiff of $500,000 for the fright, nervousness, anxiety, pain and suffering caused each plaintiff, which damages are recoverable under said laws of New York.

74. Defendants John P. Renison and the United States of America are therefore jointly and severally liable to the plaintiffs for said damages, amounting to $500,000 in the case of plaintiff Edith

Foxman and $500,000 in the case of plaintiff Erwin Foxman.

THIRD CAUSE OF ACTION

75. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-74 above.

76. Defendant Renison performed his duties, as a Revenue agent, in the investigation of the tax returns of the plaintiffs for the years 1968 through 1971, in a negligent manner, in that he failed to act prudently and reasonably in considering proof and sources of information available to him in order to reach a substantially proper determination of plaintiffs' tax liability, and in that he failed to act prudently and reasonably in the manner in which he examined proof and sources of information available to him in order to reach a substantially proper determination of plaintiffs' tax liability.

77. The actions of defendant Renison, as aforesaid, constituted the tort of negligence under the laws of New York, for which damages as stated above are recoverable under said laws of New York.

78. Defendants John P. Renison and the United States of America are therefore jointly and severally liable to the plaintiffs for said damages, amounting to $770,000 for the past and continuing damage which has been done to plaintiff Erwin Foxman's dental practice as a result of the negligent actions and omissions of defendant Renison; $500,000 for the fright, nervousness, anxiety, pain and suffering, as aforesaid, caused by defendant Renison's negligence to plaintiff Erwin Foxman; and $500,000 for the fright,

nervousness, anxiety, pain and suffering, as aforesaid, caused by defendant Renison's negligence to plaintiff Edith Foxman.

FOURTH CAUSE OF ACTION

79. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-78 above.

80. Defendant Renison, in pursuing his investigation of the tax returns of plaintiffs for the years 1968 - 1971, willfully and intentionally, and without just cause or excuse, acted and otherwise conducted himself so as to cause harm and damage to plaintiffs.

81. In particular, defendant Renison, in pursuing his investigation of the tax returns of plaintiffs for the said years, knowingly failed to fully examine sources of information available to him, and knowingly disallowed deductions for which the plaintiffs had adequate substantiation, with the sole purpose, and with the effect, of causing harm and damage to the plaintiffs.

82. The actions of defendant Renison, as aforesaid are prima facie tortious under the laws of New York, for which damages as stated above are recoverable under said laws of New York.

83. Defendants John P. Renison and the United States of America are therefore jointly and severally liable to the plaintiffs for said damages, amounting to $770,000 for the past and continuing harm which has been done to plaintiff Erwin Foxman's dental practice as a result of the said willful and malicious actions of defendant Renison; $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Erwin Foxman by the said willful and malicious actions of defendant Renison; and $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Edith Foxman by the said willful and malicious actions of defendant Renison.

FIFTH CAUSE OF ACTION

84. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-83 above.

85. Defendant Renison's actions in threatening plaintiffs, as aforesaid, with the fact that he would press fraud charges should they exercise their rights of appeal from his deficiency determinations for the years 1968-1971, constituted criminal acts under the Penal Law of the State of New York.

86. Specifically, Section 135.60 of the New York Penal Law, entitled "Coercion in the second degree," states: "A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will....4. Accuse some person of a crime or cause criminal charges to be instituted against him....8. Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely....Coercion in the second degree is a class A misdemeanor."

87. Further, Section 195.05 of the New York Penal Law, entitled "Obstructing governmental administration," states that "A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function...by means of intimidation, physical force or interference....Obstructing governmental administration is a class A misdemeanor."

88. Defendant Renison's actions, in threatening the plaintiffs, constituted a violation of both of these penal statutes.

89. Defendant Renison's actions, in harassing the First National Bank of Rochester, as aforesaid, in threatening the plaintiffs, and in intentionally acting with respect to his entire investigation so as to cause fright and nervous tension in the plaintiffs, also constituted a violation of Section 240.25 of the Penal Law, entitled "Harassment." This section, in part, reads that "A person is guilty of harassment when, with intent to annoy or alarm another person...5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."

90. Defendant Renison's actions, in violation of the PenalLLLaw of the state of New York resulting in damage and harm to the plaintiffs as aforesaid, constituted tortious behavior under the law of New York for which damages as stated above are recoverable.

91. Defendants John P. Renison and the United States of America are therefore jointly and severally liable to the plaintiffs for said damages, amounting to $770,000 for the past and continuing harm which has been done to plaintiff Erwin Foxman's dental practice as a result of the actions of defendant Renison in violation of the New York State Penal Law; $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Erwin Foxman by the said actions of defendant Renison; and $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Edith Foxman by the said actions of defendant Renison.

SIXTH CAUSE OF ACTION

92. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-91 above.

93. Defendant Renison, as aforesaid, singled out the plaintiffs for audit on the basis of criteria unrelated to the effective and proper administration of the Internal Revenue laws; namely on the basis that plaintiff Erwin Foxman practiced dentistry and was a large provider to the County of Monroe, and on the basis of defendant Renison's dislike for dentists, and in particular substantial providers to the County of Monroe.

94. Defendant Renison, as aforesaid, based his deficiency assessments on criteria unrelated to the effective and proper administration of the Internal Revenue laws; namely on the basis of the fact that plaintiff Erwin Foxman practiced dentistry and was a large provider to the County of Monroe, and on the basis of his dislike for dentists, and in particular substantial providers to the County of Monroe. Defendant Renison knowingly failed to support his findings with that degree of substantiation, arising from a reasonably thorough and objective investigation, which is generally required to support deficiency recommendations, and in fact purposefully recommended deficiencies counterindicated by the available evidence.

95. Plaintiffs Erwin and Edith Foxman were singled out for treatment in that the Internal Revenue Service does not generally proceed to audit the returns of individuals simply on the basis of the fact that they are dentists or on the basis of the fact that they are substantial providers to a local government, nor on the basis of the individual likes and dislikes of particular types of professional people by Internal Revenue Service agents.

96. Plaintiffs Erwin and Edith Foxman were singled out for treatment in that the Internal Revenue Service does not generally find deficiencies in income tax, intentionally unsubstantiated by a reasonably thorough and objective investigation, and in fact counterindicated by the available evidence; nor does the Internal Revenue Service generally find deficiencies based primarily on the fact that the taxpayer is a dentist or on the basis of the fact that he is a substantial provider to a local government, or on the basis of the individual likes and dislikes of particular types of professional people by Internal Revenue Service agents.

97. Plaintiffs were, in fact, singled out for abuse on the basis of Dr. Foxman's exercize of a basic and fundamental -- indeed constitutional -- right as a citizen -- namely the right to pursue a livelihood and profession of his choosing, within the limits of the law.

98. As a consequence of the foregoing treatment to which the plaintiffs were subjected, they were denied the equal protection of the laws by an agent of the federal government, and were consequently denied their constitutional rights under the Fifth Amendment to the Constitution of the United States.

99. The actions of defendant Renison, as aforesaid, in violating the said constitutional rights of the plaintiffs, constitute tortious behavior under federal law, for which damages as stated above are recoverable.

100. Defendant John P. Renison is therefore liable to the plaintiffs for said damages, amounting to $770,000 for the past and continuing harm which has been done to plaintiff Erwin Foxman's dental practice as a result of the actions of defendant

Renison which subjected plaintiffs to a denial of their equal protection rights; $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Erwin Foxman by the said actions of defendant Renison; and $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Edith Foxman by the said willful and malicious actions of defendant Renison.

SEVENTH CAUSE OF ACTION

101. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-100 above.

102. Defendant Renison, as aforesaid, singled out the plaintiffs for audit on the basis of criteria unrelated to the effective and proper administration of the Internal Revenue laws; namely on the basis that plaintiff Erwin Foxman practiced dentistry and was a large provider to the County of Monroe, and on the basis of defendant Renison's dislike for dentists, and in particular substantial providers to the County of Monroe.

103. Defendant Renison, as aforesaid, based his deficiency assessments on criteria unrelated to the effective and proper administration of the Internal Revenue laws; namely on the basis of the fact that plaintiff Erwin Foxman practiced dentistry and was a large provider to the County of Monroe, and on the basis of his dislike for dentists, and in particular substantial providers to the County of Monroe. Defendant Renison knowingly failed to support his findings with that degree of substantiation, arising from a reasonably thorough and objective investigation, which is generally required to support deficiency recommendations, and in fact, purposefully recommended deficiencies counterindicated by the available evidence.

104. Plaintiffs Erwin and Edith Foxman were singled out for treatment in that the Internal Revenue Service does not generally proceed to audit the returns of individuals simply on the basis of the fact that they are dentists or on the basis of the fact that they are substantial providers to a local government, nor on the basis of the individual likes and dislikes of particular types of professional people by Internal Revenue Service agents.

105. Plaintiffs Erwin and Edith Foxman were singled out for treatment in that the Internal Revenue Service does not generally find deficiencies in income tax intentionally unsubstantiated by a reasonably thorough and objective investigation, and in fact counterindicated by the available evidence; nor does the Internal Revenue Service generally find deficiencies based primarily on the fact that the taxpayer is a dentist or on the basis of the fact that he is a substantial provider to a local government, or on the basis of the individual likes and dislikes of particular types of professional people by Internal Revenue Service agents.

106. Plaintiffs were, in fact, singled out for abuse on the basis of Dr. Foxman's exercise of a basic and fundamental -- indeed constitutional -- right as a citizen -- namely the right to pursue a livelihood and profession of his choosing, within the limits of the law.

107. As a consequence of the foregoing treatment to which the plaintiffs were subjected, they were denied the equal protection of the laws by an agent of the federal government, and were consequently denied their constitutional rights under the Fifth Amendment to the Constitution of the United States and Article I, Section 11 of the New York State Constitution.

108. The actions of defendant Renison, as aforesaid, in violating the said constitutional rights of the plaintiffs, constitute tortious behavior under New York and federal law, for which damages as stated above are recoverable.

109. Defendants John P. Renison and the United States of America are therefore jointly and severally liable to the plaintiffs for said damages, amounting to $770,000 for the past and continuing harm which has been done to plaintiff Erwin Foxman's dental practice as a result of the actions of defendant Renison which subjected plaintiffs to a denial of their equal protection rights; $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Erwin Foxman by the said actions of defendant Renison; and $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Edith Foxman by the said willful and malicious actions of defendant Renison.

EIGHTH CAUSE OF ACTION

110. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-109 above.

111. Defendant Renison, in purposefully undertaking a biased and unobjective investigation of plaintiffs' tax returns, perverted the administrative and governmental processes for imposing tax liabilities upon citizens, and thereby violated plaintiffs' rights to due process of law pursuant to the fifth amendment of the constitution of the United States.

112. Defendant Renison, in making threats against the plaintiffs, as aforesaid, and thereby in purposefully hindering them from exercizing their legal rights to gain a review of his determination at the appellate level, perverted the ordinary

process of fair and impartial determination and review within the Internal Revenue Service, thereby violating plaintiffs' rights to due process of law pursuant to the Fifth Amendment of the constitution of the United States.

113. The Internal Revenue Manual, which governs the behavior of internal revenue service personnel, states: "An exaction by the United States Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the United States Constitution. Accordingly, a Service representative in his conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his duty to determine the correct amount of the tax with strict impartiality between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers." Defendant Renison acted in violation of these directions, and as stated therein violated the rights of the plaintiffs to due process of law under the Fifth Amendment to the Constitution of the United States.

114. The actions of defendant Renison, as aforesaid, in violating the constitutional rights of the plaintiffs to due process of law, constitute tortious behavior under federal law, for which damages as stated above are recoverable.

115. Defendant John P. Renison is therefore liable to the plaintiffs for said damages, amounting to $770,000 for the past and continuing harm which has been done to plaintiff Erwin Foxman's dental practice as a result of the actions of defendant Renison which subjected plaintiffs to a denial of their constitutional rights to due process; $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Erwin

Foxman by the said actions of defendant Renison; and $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Edith Foxman by the said willful and malicious actions of defandant Renison.

NINTH CAUSE OF ACTION

116. Plaintiffs herein repeat all of the allegations contained in paragraphs 1-115 above.

117. Defendant Renison, in purposefully undertaking a biased and unobjective investigation of plaintiffs' tax returns, perverted the administrative and governmental processes for imposing tax liabilities upon citizens, and thereby violated plaintiffs' rights to due process of law pursuant to the Fifth Amendment of the Constitution of the United States and Article I Section 6 of the New York State Constitution.

118. Defendant Renison, in making threats against the plaintiffs, as aforesaid, and thereby in purposefully hindering them from exercizing their legal rights to gain a review of his determination at the appellate level, perveted the ordinary process of fair and impartial determination and review within the Internal Revenue Service, thereby violating plaintiffs' rights to due process of law pursuant to the Fifth Amendment of the Constitution of the United States and Article I Section 6 of the New York State Constitution.

119. The Internal Revenue Manual, which governs the behavior of internal revenue service personnel, states: "An exaction by the United States Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the United States Constitution. Accordingly, a Service representative in his conclusions

of fact or application of the law, shall how to the law and the recognized standards of legal construction. It shall be his duty to determine the correct amount of the tax with strict impartiality as between the taxpayer and the Government, and without favoritism ordiscrimination as between taxpayers." Defendant Renison acted in violation of these directions, and as stated therein violated the rights of the plaintiffs to due process of law under the Fifth Amendment to the Constitution of the United States and Article I, Section 6 of the New York State Constitution.

120. The actions of defendant Renison, as aforesaid, in violating the constitutional rights of the plaintiffs to due process of law, constitute tortious behavior under New York and federal law, for which damages as stated above are recoverable.

121. Defendants John P. Renison and the United States of America are therefore jointly and severally liable to the plaintiffs for said damages, amounting to $770,000 for the past and continuing harm which has been done to plaintiff Erwin Foxman's dental practice as a result of the actions of defendant Renison which subjected plaintiffs to a denial of their constitutional right to due process; $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Erwin Foxman by the said actions of defendant Renison; and $500,000 for the fright, nervousness, anxiety, pain and suffering caused plaintiff Edith Foxman by the said willful and malicious actions of defendant Renison.

WHEREFORE, plaintiffs respectfully pray that this Court find that the plaintiffs' rights under New York State and federal law, as above alleged, have been violated by the defendant John P. Renison,

while acting in the employment of the United States of America, and that this Court therefore grant judgment against John P. Renison and the United States of America, jointly and severally, in the amount of $770,000 for the consequential damage to the dental practice of plaintiff Erwin Foxman, which he has suffered and continues to suffer as a result of the actions of defendant Renison; $500,000 as damages for the fright, nervousness, anxiety, pain and suffering which plaintiff Erwin Foxman has suffered and continues to suffer as a result of the actions of agent Renison; and $500,000 as damages for the fright, nervousness, anxiety, pain and suffering which plaintiff Edith Foxman has suffered and continues to suffer as the result of the actions of agent Renison, and for such further relief, including costs and disbursements in this action, as this Court may deem just and proper.

Dated: December , 1974

Respectfully submitted

Arthur L. Stern III, Esq.
Attorney for Plaintiffs
320 Executive Office Building
Rochester, New York 14614
716-546-6368

The defendants, John P. Renison and the United States of America, by their attorney,..the United States Attorney for the Western District of New York, hereby consent to the filing of the Amended Complaint to which this consent is attached, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure.

John T. Elfvin
United States Attorney for the
Western District of New York
502 U. S. Courthouse
Buffalo, New York 14202

By:

David G. Larimer
Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERWIN N. FOXMAN and EDITH C. FOXMAN,
Plaintiffs,

vs.

AFFIDAVIT

UNITED STATES OF AMERICA AND JOHN P. RENISON,
Defendants.

STATE OF NEW YORK)
) SS:
COUNTY OF MONROE )

ERWIN N. FOXMAN, D.D.S., being duly sworn, deposes and says:

1. That your deponent resides at 551 Genesee Street, City of Rochester, County of Monroe and State of New York and is one of the plaintiffs in the above-entitled action pending in the United States District Court, Western District of New York.

2. That your deponent makes this affidavit in support of the notice of motion annexed hereto and is fully familiar with all the facts and circumstances stated herein.

3. That your deponent states that on or about early Spring of 1971 at either the first or second conference in your deponent's office with Revenue Agent Renison, your deponent had a conversation with said agent in the presence of his accountant, Sidney Galinsky, regarding certain wins and losses which your deponent sustained. These losses were subsequently allowed as deductions against reported winnings by the conferee in 1974. At that time Agent Renison Stated to your deponent

that he would accept for income tax purposes only the winning which was reported on the W-2 form and completely rejected losses, which your deponent stated he sustained and tendered proof of by way of tickets stapled to racing programs which were in your deponent's possession at that time. Agent Renison stated to your deponent at that time to throw them away since, "Anyone could pick them up off the ground." That your deponent states that this conduct and subsequent conduct and statements by Agent Renison support your deponent's position as alleged in his complaint in this action that the agent acted in bad faith and with malice and unreasonable in his dealings and audit of your deponent. Further, your deponent states that at a subsequent conference held in 1974, that the claims for income tax deductions which were disallowed by Agent Renison were allowed at said conference.

4. Your deponent further states that on or about the Spring of 1971 during a conference with Agent Renison, your deponent's accountant, Sid Galinsky, and your deponent at your deponent's office, Agent Renison stated that he would not allow the depreciation of your deponent's real property and equipment as set forth in his previous tax return, but would be granted an arbitrary figure of depreciation, which was established by Agent Renison. That your deponent offered to obtain and pay for an appraisal of the real property and the dental equipment by recognized authorities and abide by their findings regarding the real property and equipment. Again, Agent Renison completely

rejected this proposal and refused to reconsider his position which your deponent states again supported his contentions in the complaint herein that Agent Renison acted unreasonable and with malice which is further supported by later or subsequent decision at the conference in 1974 wherein the depreciations claimed were granted to your deponent at that time.

5. That on or about December, 1971, your deponent again had a meeting at his office with his accountant, Sidney Galinsky, Agent Renison and your deponent during which time certain partnership losses incurred by your deponent's wife and Dr. Lempert were incurred in the operation of DeeDees Stables. At that time your deponent was informed by Agent Renison that he was not going to allow the partnership expenses to your deponent and his wife. Your deponent further states that Agent Renison had in his possession at that time some cancelled checks supporting the allegations of payments of debts of his wife for her share of the losses of the partnership upon which claim was being made. Agent Renison stated that he was not allowing these expenses based upon information he had received from "someone" that your deponent's wife had failed to pay her fair share of the partnership expenses. That your deponent asked who the "someone" was who had given this information to Agent Renison and Agent Renison refused to disclose who this said person was. Again, your deponent alleges that said conduct was arbitrary on the part of Agent Renison and unreasonable and again showed his bad faith in conducting an audit of your deponent and his wife. Further, your deponent states that in

the subsequent conference regarding the tax years 1968, 1969 and 1970, the expenses of said partnership were substantially granted to your deponent and his wife.

6. That on or about the Fall of 1971, Agent Renison again had occasion to meet with your deponent and his accountant at your deponent's office wherein Agent Renison stated to your deponent that he was not allowing a claimed deduction of approximately $2,400.00 from your deponent's medicaid accounts receivable based upon the fact that your deponent had assigned said accounts receivable to Main Billing Service. Agent Renison stated that he was only allowing your deponent $813.00 because his checking of the records at the Main Billing Service indicated that your deponent had only assigned for a 10% discount some $8,000.00 worth of accounts receivable rather than $24,000.00 of accounts receivable. Your deponent at that time offered to show his patients records indicating an assignment of some $24,000.00 worth of accounts receivable to Agent Renison who refused to review the same. Further, your deponent states that subsequently in the course of the lawsuit herein your deponent learned that Agent Renison's own worksheets showed that he had learned that your deponent had discounted some $24,000.00 worth of medicaid accounts receivable in the year 1970 and not the $8,000.00 as he informed your deponent at the above referred meeting. In view of this evidence, your deponent states that the obvious inference was that Agent Renison intentionally lied or attempted to harass and annoy your deponent with constant

allegation of filing a fraudulent return and threatening your deponent with criminal charges, all of which were done in bad faith and were unreasonable in view of the facts and circumstances as disclosed at the time.

7. That on or about May 24, 1972, your deponent had occasion to be present in Agent Renison's office and discuss his ARA report, which your deponent had previously received relating to his disallowance of stock losses which your deponent alleged in his return. That prior to going to Agent Renison's office, your deponent personally obtained from his stockbrokers duplicate statements relating to his purchase and sale of stock and stock options to verify the losses claimed in his return. Upon producing them to Agent Renison on or about the abovesaid date and after his review of the same, Agent Renison told your deponent that he would not allow these losses stating that these statements were worthless to him in that the information contained in them varied from the information contained in your deponent's tax return. Again, your deponent states that said statements demonstrate Agent Renison's personal feelings that he would prove your deponent a fraud and a cheat and that these were unreasonable actions by Agent Renison in view of the documentary evidence before him and his persistent and consistent course of conduct in threatening to commence criminal actions against your deponent relating to his tax return.

8. That throughout Agent Renison's investigation and audit of your deponent, your deponent received information

from other persons, particularly the secretary of your deponent's accountant that Agent Renison felt that your deponent was "cheating the Government" and "hiding money" somewhere and that Agent Renison would find it. Further, your deponent feels that Agent Renison was biased against dentists in that he stated that Agent Renison had just finished paying a huge dental bill to his family dentist. This occurred on Agent Renison's very first visit to your deponent's office in November of 1970 prior to Agent Renison's commencement of the audit. That Mr. Renison's biase and prejudice against dentists in general, and Dr. Foxman in particularly culminated on or about May, 1972, when your deponent had occasion to meet with Agent Renison in the presence of his accountant at his office and was told that he must sign a statement agreeing with Agent Renison's ARA report, or that he, Agent Renison, would turn the file over to the Fraud Division of the Internal Revenue Service for further investigation and also, that he, Agent Renison, would reopen the years of 1968, 1969 and 1970. These years, 1968 through 1970, had already been investigated by the Fraud Division of the IRS and deponent had been cleared with no action taken against your deponent. Your deponent then discussed the ARA signing and threat of reinvestigation with his accountant. Your deponent's accountant advised deponent not to sign the ARA statement. However, do to the threat made by Agent Renison, your deponent agreed to sign the ARA statement to avoid further harassment in the form of a second fraud investigation. Deponent's accountant informed Agent Renison that your deponent would sign the ARA statement,

but that it would be appealed to the conference level. Whereupon, Agent Renison in the presence of your deponent, advised deponent's accountant that if it were appealed to the conference level, he, Mr. Renison, would put this back in for a second fraud investigation. That in view of the previous course of conduct as described in this affidavit on the part of Agent Renison, your deponent was most reluctant to go through a further investigation and subject himself to possible criminal charges and trial in this matter and signed said agreement and agreed not to appeal the same. That your deponent states that he was only able to reopen these matters when he appeared before a conference relating to his 1971 tax return again which was investigated by Agent Renison and when appearing before the conference relating to this matter, your deponent was advised to reopen his 1968,1969 and 1970 tax audit, all of which were conducted by Agent Renison, by requesting a conference which was granted. At this conference, the majority of the deductions which your deponent sought from Mr. Renison were granted by the conferee for the years 1968, 1969 and 1970, as well as for the year 1971.

9. That as a result of the course of conduct previously described by Agent Renison and his constant harassment of your deponent and unreasonable methods of dealing with your deponent's tax return, your deponent suffered a repeated nervous disorder to the extent that he was required to seek psychiatric care and treatment for which he had been cured on or about 1960. Your deponent now has to rely on the taking of barbituates in order

to keep functioning at a normal level so that he can perform his daily tasks. Further, your deponent states that your deponent's wife has undergone a series of operations much of which, upon information and belief, were caused by the nervous condition brought about by Agent Renison's harassment and unreasonable course of conduct as hereinabove described. Your deponent's wife is currently in the hospital for more surgery because of these same disorders. In addition to your deponent's physical health, your deponent suffered a severe financial setback in that he suffered a substantial loss of income in that many of his accounts receivable were seized and he had no operating capital with which to treat the majority of his medicaid patients who constituted the bulk of his dental practice. As a result, your deponent's real property and place of business were actually seized by the Internal Revenue Service in 1974, and your deponent was put out of business as a professional person when he could not pay taxes then due and owing. Further, your deponent's good reputation in the community was harmed and maligned by the many news articles relating to your deponent and the statements of Agent Renison to friends and business associates and other persons. That your deponent was a cheat and a fraud and was withholding or hiding money from the Government in filing his tax return. That during the years 1971 through 1974 your deponent lived in constant fear and pressure from Agent Renison that he would not be entitled to legitimate deductions in filing his income tax returns and was constantly

in fear of being indicted wrongfully on evidence turned over to the Fraud Division by Agent Renison which evidence would not be completely factual, relating to losses and deductions claimed by your deponent in filing his returns.

WHEREFORE, your deponent respectfully requests that the relief requested by the defendant in the notice of motion herein be denied in all respects.

ERWIN N. FOXMAN, D.D.S.

Sworn to before me this
30th day of May, 1977.

CYNTHIA A. NEUNER
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1979

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

ERWIN N. FOXMAN and
EDITH C. FOXMAN,

Plaintiffs

v.

UNITED STATES INTERNAL
REVENUE SERVICE,
JOHN P. RENISON,

Defendants

CIVIL NO. 1973-589

AFFIDAVIT

STATE OF NEW YORK )
) SS
COUNTY OF MONROE )

SIDNEY V. GALINSKY, being first duly sworn according to law, says as follows:

1. That your deponent is a Registered Public Accountant, whos e professional office is located at 221 Ridge Road East in the city of Rochester, New York.

2. That during the years 1970 through the end of 1972 his office was located at 1286 St. Paul Street in the city of Rochester, New York.

3. Your deponent was the plaintiff's, Dr. Foxman's, accountant for the involved years 1968, 1970, and 1971.

4. That your deponent went to Plaintiff's office in late November 1970 (around Thanksgiving). The Defendant, Mr. Renison, was present. I was there at Plaintiff's request.

5. That your deponent had known the Defendant from a prior audit involving another client of your deponent's, about a year

earlier. At this meeting, there was very little conversation between myself and the defendant, Mr. Renison. However, your deponent recalls that due to the fact that the Plaintiff, Dr. Foxman, did not have an adding machine in his office, the Defendant, John P. Renison, telephoned a TIMOTHY MILLER to bring an adding machine to the Plaintiff's office. That the Defendant and Mr. Miller were engaged in adding the Plaintiff's "year book". That your deponent remained at the Plaintiff's office for approximately two hours.

6. That your deponent attended another meeting with the Plaintiff and the Defendant approximately two months later at the Plaintiff's office.

7. That at this second meeting there was a discussion concerning depreciation of certain items of property of the Plaintiff. Your deponent advised the Defendant that I had not prepared a previous depreciation schedule, and that someone else had. That the discussion also involved the proper allocation between office space, equipment purchased with the property, and the total house space of the Plaintiff's home. Defendant requested a break-down between the house, office space and equipment purchased. Iadvised Defendant that there was no break-down because the property was purchased as one complete unit, including home, office, and office equipment. I advised Defendant that a breakdown was unobtainable because seller had departed to parts unknown.

At this point, Plaintiff told Defendant, Mr. Renison, that he would hire the services of a qualified appraise to come in and help determine a reasonable and proper allocation for depreciation purposes. Defendant responded, "don't bother to get an appraiser because I won't accept any appraisal --- it would be to no avail."

8. Your deponent recalls that Defendant, Renison, had with him a copy of Plaintiff's tax return and a depreciation schedule.

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9. Your deponent questioned the Defendant regarding his disallowance of race tickets losses which offset race winnings which were properly reported. Defendant responded by saying " anybody could pick them up off the ground." Defendant, Mr. Renison, was presented Plaintiff's records of these losses which consisted of programs showing winnings in certain races and also tickets stapled to the programs to show the losses as offset against the winnings. Defendant, Mr. Renison, stated to Plaintiff "throw this material in the waste basket as being meaningless." Defendant advised Plaintiff that he would use the winnings as income and would not allow the losses against such winnings. Defendant also did not add up the losing tickets, nor did he recognize that they were not all $2.00 tickets in spite of their being clearly marked as $2, $5, and $10.00.

10. The third meeting occurred at Plaintiff's office in January 1972; present were Plaintiff, Defendant, and your deponent. At this meeting, Defendant advised Plaintiff that he was not going to allow Plaintiff his share of losses on the horse-partnership with Dr. Lempert because, "Somebody told me that you did not pay for the horses". Your deponent then asked Defendant, Renison, why was he allowing Dr. Lester Lempert a deduction for his share of the partnership losses and not the Plaintiff; this is the point at which the Defendant made the above quoted statement. Plaintiff, Dr. Foxman, then asked the defendant to tell him who the "someone" was . Defendant told Plaintiff that he was not going to tell him. Plaintiff said, "I want to face my accuser." Defendant Renison again replied "I'm not going to tell you."

11. The discussion then turned to Plaintiff's arrangement with Main Billing Service, involving Plaintiff's turning over to that Service his Medicaid accounts receivables. Main Billing Service would , in turn, pay Plaintiff face value less a 10% discount.

Defendant Renison quickly showed me what he called a "Ledger Sheet" of Main Billing Records. He said that "according to their records, Plaintiff had only discounted $8,137.60 of Medicaid accounts receivable during the calendar year 1970. Therefore, Defendant would allow only $813.76 as the 10% deduction for the year 1970, and not the approximately $2,400.00 deduction as claimed by the Plaintiff as being 10% of the $24,000.00 which the Plaintiff claimed had been factored to Main Billing Service during 1970.

At no time could your deponent verify that what Defendant Renison quickly thrust in front of me, was in fact a Main Billing Ledger Sheet. Defendant advised Plaintiff and myself that what he claimed was the ledger sheet from Main Billing Service was the only record that the Service had of discounting Plaintiff's accounts receivable for the year 1970. What the Defendant claimed was the Main Billing Service record, was a xeroxed sheet and not the original. Your deponent believes that what the Defendant Renison showed me was the record for the month of June 1970 only.

At this point, Plaintiff Dr. Foxman advised Defendant that he could verify the $24,000.00 of Mediacaid accounts receivable factored to Main Billing Service during the year 1970 by the individual patient's records file in the upper left hand desk drawer of his office and pulled the drawer open for the Defendant to see them.

Defendant, Mr. Renison, advised Plaintiff that he was not going to bother going through them, but that he was going to rely on the so-called Main Billing Service record which reflected $8,137.60 worth of accounts receivable factored during the year 1970. Plaintiff responded by saying "either the Defendant, Renison, did not see the correct records at Main Billing Service, or else he saw a duplicate set of books".

12. The next meeting took place in May 1972 at the Plaintiff's office: present were, the Defendant Mr. Renison, the Plaintiff Dr. Foxman, and your deponent. Defendant brought with him an assessment sheet (Revenue Agent's Report, R.A.R.) for Plaintiff's signatures. Your deponent reviewed the assessment sheet and advised the Plaintiff "not to sign It", because there were many intentional errors therein with which I did not agree. Plaintiff thereupon advised Defendant, Mr. Renison, that he would not sign the R.A.R. Defendant, Mr. Renison, and Plaintiff, Dr. Foxman, then had a discussion which I did not overhear. After their discussion, Plaintiff advised your deponent that he would sign the R.A.R. I then advised Defendant Renison that if the R.A.R. were signed by the Plaintiff, Dr. Foxman, the R.A.R. would be taken to the Conference Level. Whereupon Defendant, Mr. Renison, advised at this point that if Plaintiff should re-open the case involving the tax returns for the years 1968, 1969, and 1970, he, the Defendant, could put this matter back into the Fraud Division of the Internal Revenue Service for a second fraud investigation. This was the Defendants second reference to recommending fraud proceedings against the Plaintiff.

13. Defendant had disallowed certain stock losses. Plaintiff said that he would make it a point to get copies of the stock

transactions showing these losses and also copies of receipts to show proof of payment of other disallowed deductions. (This date was your deponents first knowledge that Defendant Renison had disallowed certain stock losses, and this knowledge first came to your depnent's knowledge when Defendant presented the assessment sheet.) Defendant, Mr. Renison, thereafter did leave the R.A.R. for Plaintiff's and his wife's signatures.

A few days later, Plaintiff came to your deponent's office with copies of the stock trnsactions (Renison Exhibit #7) and other receipts previously disallowed by the Defendant, as aforesaid, and showed them to me. He, the Plaintiff, showed me his wife's signature on the R.A.R. and said that he was taking these to Mr. Renison's office. The Plaintiff said that he would show Mr. Renison the stock transactions (Renison Exhibit #7) and the other receipts for allowances and then add his signature to the R.A.R. I advised Plaintiff that after he signed the consent form, to bring a copy of same to me. Plaintiff returned to my office about an hour later , after having been to Defendant's office. Plaintiff advised me that the Defendant would not give him a copy of the consent form. Plaintiff also advised me that the Defendant, Mr. Renison, would not accept any evidence of the stock losses or the other receipts.

14. One month after the Plaintiff had signed the 1968, 1969, and 1970 R.A.R.,:either in late June of 1972 or early July 1972 an audit of Plaintiff's 1971 tax return was conducted in your deponent's office by the very same Defendant, Mr. John Renison. Mr. Renison did not have a copy of the tax return, and I gave Mr. Renison an unsigned copy of Dr. Foxman's 1971 tax return from my own file, since all copies were kept in my office.

Your deponent gave Mr. Renison a box containing all of the Plaintiff's tax records for the year 1971. This included, all cancelled checks, the check book and the stubs therein, all bank statements, all the "day sheets" listing the names of the patients seen each day and the charges and payments for each as well as the mode of payment, all bank deposit slips, and all other receipts. There was little, if any, discussion at this meeting. However, Defendant Renison did make the statement that "he knew Plaintiff Dr. Foxman was cheating on his taxes, and that he, Mr. Renison, was going to do his best to prove it".

Defendant, Mr. Renison, made use of your deponent's office for a few days. Defendant never asked your deponent anything about the Plaintiff's tax records or about the audit.

15. That thereafter, Defendant sent your deponent a letter, (Armstrong Exhibit "11), of which Plaintiff has a copy. This time, Plaintiff refused to sign the assessment and thereafter requested a "conference" upon receipt of the 30 day letter.

16. That the Conferee was a Mr. Ronald Armstrong at the conference involving the Plaintiff's 1971 tax return. Those present at the conference were the Plaintiff, the aforementioned Conferee, and your deponent. Your deponent believes that there werethree conferences held due to the fact that certain information was requested by the Conferee and if I didn't have it with me in the Conferee's office, I would have to return to my office to pick it up.

17. Your deponent recalls the Conferee saying at one point that "the Defendant's,Renison's, write up is very misleading". Your deponent asked to see the Defendant's write-up, but my request was

denied. Many items disallowed by the Defendant were reversed by Conferee Mr. Armstrong and allowed to stand as valid deductions. The Mastercharges were found to be picked up by the Defendant as duplicate income. The depreciation allowances were reverted back to practically the same manner in which the taxpayer had reported it on his filed income tax return.

18. That the Conferee, Mr. Armstrong, suggested that Plaintiff re-open the case involving the 1968, 1969, and 1970 tax returns of the Plaintiff.

19. That a conference was thereafter held on the case involving the 1968, 1969, and 1970 tax returns of the Plaintiff, before Mr. Roger Matjakowski, Conferee. Present were the Plaintiff, Dr. Foxman, Conferee Matjakowski, and your deponent. Your deponent recalls that there were two conference meetings.

20. That the aforesaid Conferee accomplished the following: re-adjusted the depreciation, allowed wagering losses(against the wagering winnings), allowed the hace horse partnership losses, allowed the stock losses, and allowed a host of other deductions previously disallowed by the Defendant.

21. That one of the Conferee's main allowances was for the Main Billing Factoring Service. The Conferee did not have a copy of Main Billing Service's ledger sheet. He had only a sheet of paper containing five figures supplied by the Defendant; but, it was <u>not</u> the same sheet of paper which the Defendant had previously shown your deponent. What the Conferee had was a regular work sheet, (Renison Exhibit #3, page 30 of Renison's work sheets) which totaled $8,137.68), of which he had allowed as a 10% discount the sum of $813.76.

Plaintiff asked of the Coferee for substantiation of the five figures which appeared on this work sheet. Mr. Matjakowski, Coferee, advised that he could not verify the figures, and that the Defendant, Mr. Renison, must have obtained these figures from the ledger sheet.

At the second conference meeting, Mr. Matjakowski advised your deponent and the Plaintiff that the Defendant, Mr. Renison, had obtained these figures, in question, from five checks that the Defendant had seen at the Main Billing Service Offices (that had allegedly been issued to the Plaintiff); But, the Conferee could not produce the five checks in question. The Conferee then stated that the Defendant must have "backed into" the figures. The Conferee, Mr. Matjakowski, made reference to the way in which the R.A.R. was prepared, and that it was very misleading.

That Plaintiff received full credit for Main Billing Service discounts for the year 1970 which the Defendant had disallowed.

23. That the Defendant, John P. Renison, has slandered the good name of the Plaintiff, Dr. Erwin N. Foxman.

23. Based upon the aforegoing, which I have personally witnessed, your deponent states that "Revenue Agent John P. Renison had conducted the audit of Plaintiff's 1968, 1969, 1970, and 1971 Federal Income Tax Returns in knowing violation of all reasonable and proper manner of the established standards and practices of the Internal Revenue Service." "Furthermore, he has deprived the Plaintiff, Dr. Foxman, of his endowed Constitutional Rights."

24. I have nothing further to say.

SIDNEY A. GALINSKI

Sworn to and subscribed before me
this 10th day of March, 1977

NOTARY PUBLIC

JOSEPH R. PIAZZA, Notary Public
New York State Monroe County
My Commission Expires March 30, 19[illegible]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| ERWIN N. FOXMAN and EDITH C. FOXMAN, Plaintiffs | ) | |
| v. | ) | CIVIL NO. 1973-589 |
| UNITED STATES INTERNAL REVENUE SERVICE, JOHN P. RENISON, Defendants | ) | |

AFFIDAVIT

STATE OF NEW YORK )
) SS
COUNTY OF MONROE )

LESTER LEMPERT, being first duly sworn according to law, says as follows:

1. That your deponent is a doctor of dental surgery (D.D.S.), licensed to practice my profession at 1081 North Clinton Avenue in the City of Rochester, State of New York.

2. That I was first contacted by the Internal Revenue Service (I.R.S.) by its agent, the Defendant, Mr. Renison, by telephone, either late in the year 1971 or early in the year 1972, with respect to an income tax audit of the Plaintiff, Dr. Erwin N. Foxman.

3. That the nature of the call had to do with a certain partnership agreement between myself and Edith C. Foxman, Plaintiff's wife. I was asked to report for an interview at the Old Federal Building in Rochester, New York.

4. I was interviewed by Mr. Renison and a Mr. Offen, whom I believe was of the Special Intelligence Division of the I.R.S.

The interview was conducted mainly by the Defendant, Mr. Renison, while Mr. Offen took notes. The nature of the questions asked concerned the number of horses owned by the partnership, the number of horses bought and sold, and raced, the names of the horses, dates, of sales, and the names of the sellers. Your depnent was asked to bring the partnership agreement, which I broght. A copy of same was xeroxed and the original was returned to me by mail.

5. Your deponent recalls that the Defendant, Mr. Renison, specifically stated to me that "someone told him that the Plaintiff, Dr. Foxman, did not pay for the horses sold to the partnership," herein-before mentioned. But the Defendant, Renison, did not reveal to methe "someone" previously referred to. Your Deponent responded by advising the Defendant, Mr. Renison, that his information was incorrect and that I had all the records and cancelled checks in my accountant's office to prove otherwise.

6. Your deponent thereupon advised the interviewers that my accountant was Mr. Norman Rice from Seymour-Grau Associates, Certified Public Accountants (C.P.A.) of Rochester, New York. I know that subsequently, either the Defendant or someone from his office, or the Intelligence Division did in fact contact Mr. Rice and an examination of the partnership was held in the office of Mr. Rice.

7. That you deponent believes that the interview with the Defendant, Mr. Renison, and Mr. Offen lasted between one and one half to two hours.

8. That your deponent was questioned in some detail about the horses.

9. Your deponent was paid by the Plaintiff, Dr. Foxman, by personal check to cover his share of the partnership expenses and debts. That the partners made personal adjustments between themselves as to the partnership business. That it all was rather informal and personal; that there was never any problem between partners in the operation of the partnership.

10. That the partnership no longer exists: that it was wound-up shortly after the partners split (divided) the horses and got out of the breeding and racing business sometime in 1973. Your deponent, however, kept my horses for a while thereafter.

11. That for the taxable years 1968, 1969, and 1970, your deponenet was allowed as deductions on my individual tax returns partnership losses. Your deponent was told by the Plaintiff, Dr. Foxman, however, that similar losses deducted on his individual tax returns for the years 1968,1969 and 1970, were disallowed as deductions by the Defendant, John P. Renison, and the I.R.S.

12. That your deponant was a cash basis taxpayer for the years hereinfor indicated, and the partnership was also a cash basis taxpayer, and that the Plaintiff, Dr. Erwin N. Foxman was also a cash basis taxpayer. That the aforementioned partnership agreement was prepared by Mr. Beryl Nusbaum, an attorney of the City of Rochester, New York.

13. Referring back to the aforementioned interview conducted by the Defendant, John P. Renison, and Mr. Offen, the interview was conducted on a Thursday afternoon (my day off), by pre-arrangement, and that it was about the Foxman matter. Your Deponant was not told which unit of the I.R.S. was handling the "Foxman matter", nor was your Deponant advised of his rights, nor sworn or put under oath.

14. Your Deponant had a financing arrangement with the First National Bank branch office on Monroe Avenue, Rochester, New York, as follows: your Deponant would turn in my claim form for accounts receivables (medicaid accounts receivables) to the aforesaid bank. The bank, in turn, would make me a loan of 80% of these accounts receivables. That the First National Bank was the only bank which had this program available for the professional men. That this arrangement and program of financing was set up by the First National Bank, because "Medicaid" was 6 months behind in paying its bills for Dental Services rendered. This financing arrangement was begun about the middle of 1970, and the Plaintiff, Dr. Foxman, was the principal architect of this financing arrangement with First National Bank.

15. Your Deponant was never notified by First National Bank that this program was going to be discontinued. However, your Deponant voluntarily ceased participation in this financing arrangement late in 1973, because that is when "Medicaid" resumed paying its bills on time.

16. I have nothing further to say.

DR. LESTER LEMPERT

Sworn to before me this ___ day
of _____ 1977

NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

ERWIN N. FOXMAN and
EDITH C. FOXMAN,

Plaintiffs

v.

UNITED STATES INTERNAL
REVENUE SERVICE,
JOHN P. RENISON,

Defendants

CIVIL NO. 1973-589

AFFIDAVIT

STATE OF NEW YORK )
COUNTY OF MONROE ) SS

DONNA THEIM, being first duly sworn according to law, says as follows:

1. I am presently self-employed, having a business address at 945 Joseph Avenue, Rochester, New York.

2. That your deponent was employed as a public accountant in the office of Sidney Galinsky, a licensed public accountant, from 1968 to 1974 in Mr. Galinsky's office located at 1286 St. Paul Street, Rochester, New York, where my duties included accounting and secretarial work.

3. That in the early part of the year 1971, Defendant, Mr. Renison, appeared at Mr. Galinsky's office. Mr. Galinsky was not in at the time. Mr. Renison requested me to give him Plaintiff's check book, checks, bank statements, and all other available records pertaining to the Plaintiff. I then gave the Defendant all such available records of the Plaintiff. There-upon, Defendant sat down in my office and checked said items.

4. That the Defendant, Mr. John P. Renison, was conducting a personal vendetta against the Plaintiff, Dr. Foxman.

5. That your deponent remembers Defendant, John P. Renison, saying to your deponent that "he was sure that Plaintiff, Dr. Foxman, was hiding something and that he, Mr. Renison, was going to find it." Defendant also said to your deponent that "Mr. Galinsky was a bad accountant and kept bad records."

6. The Defendant, John P. Renison, has slandered the good name of the Plaintiff, Dr. Foxman, by implying that the Plaintiff was a thief.

7. I have nothing further to say.

DONNA THEIM

Sworn to before me this 10th day of March, 1977

NOTARY PUBLIC

JOSEPH R. PIAZZA, Notary Public
New York State Monroe County
My Commission Expires March 30, 1978

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 79-6165

ERWIN N. FOXMAN and EDITH C. FOXMAN,

Plaintiffs-Appellants

v.

JOHN P. RENISON,

Defendant-Appellee

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

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BRIEF FOR THE APPELLEE

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(Reference Pages 3 and 14)
ONLY

On November 4, 1970, the Internal Revenue Service undertook an audit of the taxpayers' federal income tax returns for 1969. Responsibility for that audit and subsequent audits of the years 1968 and 1970, was assigned to Renison by his Group Supervisor, Nicholas Ange. (Renison Affidavit (Mot. Ex. D), pars. 2(a)-(c), (f).)[3/] In May, 1972, Renison concluded the audit for the years 1968 through 1970, and proposed income tax deficiencies for each of those three years, to which the taxpayers consented on May 24, 1972.[4/] (Renison Affidavit, par. 2(e) and Ex. D-5.)

From June through October, 1972, Renison examined the taxpayers' 1971 federal income tax return. The audit for the 1971 return was again assigned to him for audit by Ange, for the purpose of bringing it into conformity with the changes agreed to by the taxpayers for the years 1968, 1969, and 1970. A deficiency for 1971 taxes was proposed in October, 1972. (Renison Affidavit, par. 2(f), (g) and Ex. D-7(d), D-7(g).) The taxpayers were advised of the proposed adjustments by letter of December 13, 1972 (Renison Affidavit Ex. D-7(a)), and shortly thereafter requested a district conference to discuss the adjustments. The conference resulted in sustaining Renison's assessment

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3/ The affidavits referred to herein, unless otherwise indicated, are those filed in support of Renison's initial motion for summary judgment.

4/ In April of 1971, while Renison was conducting the audit, the case was referred to the Intelligence Division, for potential criminal prosecution for fraud. It was continued as a joint investigation until January 1, 1972, when the case was returned to the Audit Division. (Renison Affidavit, par. 2(d) and Ex. D-4.) The special agent handling the case instructed the Audit Division to notify the Intelligence Division if any evidence of fraud were disclosed during subsequent examination. (R. 61.)

denied, 434 U.S. 1047 (1978). Their claim of a denial of equal protection of the laws stems from their assertion (R. 35) that they were "singled out for treatment" on the basis of Renison's dislike for dentists, particularly Medicaid providers. Yet, despite voluminous discovery, at no point was it established that Renison bore any ill feeling toward dentists as a class, or taxpayer in particular, and at no point was it established that Renison initiated the audit of taxpayers as a result of newspaper articles detrimental to taxpayer. To the contrary, Renison's affidavit states that he first became aware of taxpayer as a result of an investigation of an unrelated Internal Revenue Service matter. (Renison Affidavit (Mot. Ex. D), par. 6.) Further, Renison was assigned the audit of taxpayers by his supervisor, and did not seek out the assignment. (Renison Affidavit, pars. 2(a)-(c), (f).)

The right to determine the correctness of any tax return is statutorily prescribed by Congress. Pursuant to Section 7601 of the Internal Revenue Code of 1954 (26 U.S.C.), the Secretary of the Treasury has the duty to "cause officers or employees of the Treasury Department to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." In order to effectuate this mandate, the Internal Revenue Service has been given the authority to examine records and witnesses for the purpose of ascertaining the correctness of any return. Code Sec. 7602 (26 U.S.C.).

There is no prerequisite that an affirmative showing of probable cause must be made before auditing a taxpayer. Foster v.

No. 80-421

Supreme Court, U. S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

ERWIN FOXMAN AND EDITH FOXMAN, PETITIONERS

*v.*

JOHN P. RENISON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-421

ERWIN FOXMAN AND EDITH FOXMAN, PETITIONERS

*v.*

JOHN P. RENISON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners[1] seek review of the dismissal of their suit for damages against respondent, a former Internal Revenue Service agent, for alleged violations of their constitutional rights during the course of an audit of their federal income tax returns.[2]

Petitioner is a dentist in Rochester, New York, whose practice consists largely of Medicaid patients. In November 1970, the Internal Revenue Service undertook

[1]Edith Foxman is the wife of Erwin Foxman. Erwin and Edith Foxman filed joint tax returns during 1968-1971. References to "petitioner" are to Erwin Foxman.

[2]Although petitioners cite (Pet. 2) 28 U.S.C. 2101(c) as the jurisdictional basis of their petition, we believe that the correct jurisdictional provision is 28 U.S.C. 1254.

an audit of petitioners' 1969 federal income tax return. Responsibility for that audit was assigned to respondent (Pet. App. 3562).[3] After the Commissioner determined a deficiency for 1969, respondent was assigned the audit of petitioners' 1968 and 1970 tax returns. In May 1972, respondent concluded the audit for those years, and proposed income tax deficiencies for each year, to which the petitioners consented[4] (Pet. App. 3560).

Respondent then examined petitioners' 1971 tax return in order to conform that year's return to the agreed changes for 1968-1970. In October 1972, respondent proposed a deficiency for 1971. After being advised of these proposed adjustments, petitioners requested a district conference. As a result of the conference, the proposed deficiency was sustained in part, and petitioners consented to the revised deficiency (Pet. App. 3560-3561). Petitioners thereafter filed a claim for refund for each of the years 1968 through 1970, in order to conform their tax returns for 1968-1970 to the 1971 return. These claims were partially allowed (Pet. App. 3561).

Petitioners took no further administrative action to contest the tax liabilities determined. Instead, they brought suit against respondent in the United States District Court for the Western District of New York for damages for alleged violations of their constitutional

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[3] The appendix to the petition was not re-numbered. References to the page numbers are therefore to the original pagination; "R." refers to the record appendix filed in the court of appeals.

[4] In April 1971, while respondent was conducting the audit, the case was referred to the Intelligence Division, for potential criminal prosecution for fraud. It was continued as a joint investigation until January 1, 1972, when the case was returned to the Audit Division (R. 61).

rights. The district court granted respondent's motion for summary judgment and the court of appeals affirmed (Pet. App. 3559-3565).

1. The decision below correctly rejected petitioners' claim that respondent's actions during the course of auditing their tax returns violated their constitutional rights to due process and equal protection of the laws. Petitioners allege that they were given the option of accepting respondent's report of tax deficiencies or possibly being subjected to a second investigation for fraud. But the record indicates that petitioners were advised by their accountant that they could accept the revenue agent's report and forestall a fraud investigation, while at no time giving up their rights to seek further administrative or judicial review of the deficiencies assessed (Pet. App. 94). On the other hand, respondent could have recommended that an investigation by the Intelligence Division proceed (Pet. App. 94). *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), upon which petitioners rely (Pet. 21-25), is therefore inapplicable. Indeed, in that case, the Court held that an arguably far more palpable deprivation of liberty—where a state prosecutor carried out a threat to reindict the defendant on more serious charges if he did not plead guilty to lesser offenses—did not violate the defendant's rights to due process.

2. Petitioners further claim (Pet. 26) that the claim for which they seek recovery "is not the type of damage which was redressable through IRS review procedure," and may be vindicated only by a suit for damages. But even assuming that damages would be an appropriate remedy for the alleged violations, petitioners have not stated a cause of action which asserts a constitutionally-protected right. Petitioners chose not to take advantage of the internal appeal process and judicial remedies available to

them to challenge their asserted tax liability. The courts below therefore correctly refused to allow them to seek damages as a substitute for their inaction.

3. Petitioners also assert (Pet. 31-33) that respondent intentionally violated Internal Revenue Service regulations in conducting successive audits, and in so doing violated their rights to due process. However, the audits for petitioners' returns for 1968-1970 were assigned to respondent by his supervisor, and he was assigned the audit for 1971 only for the purpose of conforming that year's return to the changes agreed to by petitioner for the earlier years. Petitioners made no showing that this procedure violated any agency regulations.

4. Petitioner claims (Pet. 33-38) that respondent intentionally caused the termination of a financing relationship between him and the First National Bank of Rochester. But the deposition testimony indicated that the bank terminated this relationship primarily because it was unprofitable. Indeed, there is nothing in the record to support petitioners' assertion that respondent deliberately interferred with this agreement in any way. At all events, as the court below noted (Pet. App. 3564-3565), petitioners did not have a property interest protected by the Due Process Clause because they did not have a legitimate claim of entitlement to the financing relationship. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

5. Finally, petitioners contend (Pet. 39-41) that the court of appeals has granted absolute immunity to Internal Revenue Service agents from damage suits where violations of constitutional rights have been alleged. But the district court dismissed the complaint because it failed to state a claim based upon a violation of constitutional

rights.[5] Here, all audits conducted by respondent were reviewed and approved by supervisory personnel in the Buffalo District Office of the Internal Revenue Service. Thus, even if petitioners had established a claim arising from a constitutional violation, the suit would be barred by the defense of qualified immunity, because there were reasonable grounds for respondent's belief that the challenged actions were appropriate, and there was no finding that he acted in bad faith in carrying out his duties. *Butz* v. *Economou*, 438 U.S. 478 (1978); *Tigue* v. *Swain*, 585 F. 2d 909 (8th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

OCTOBER 1980

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[5]With respect to petitioners' final argument (Pet. 41-46) that the district court should have tried their state law claims under the doctrine of pendent jurisdiction, there is nothing in the complaint which rises to the level of either a federal or state constitutional violation. The district court found the constitutional claims alleged to be insubstantial (Pet. App. 58-72). Therefore, its decision not to exercise pendent jurisdiction was proper. *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

DOJ-1980-10